No. 89-1626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLARK & WILKINS INDUSTRIES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Petitioner's due process rights of sufficient notice and opportunity to be heard were denied when the National Labor Relations Board concluded that Petitioner violated the National Labor Relations Act premised upon a theory that was neither alleged in the complaint nor fully and fairly litigated, but rather, was initially raised at the conclusion of the hearing in Respondent's post-hearing brief.

LIST OF PARTIES

The parties to the proceedings below were Petitioner Clark & Wilkins Industries, Inc., Respondent National Labor Relations Board and Respondent Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Intervenor).

RULE 29.1 DISCLOSURE

There are no parent companies or subsidiaries of Petitioner.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Clark & Wilkins Industries, Inc., prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit enforcing a decision and order of the National Labor Relations Board.

OPINIONS BELOW

The opinion below of the District of Columbia Circuit Court of Appeals is reported at 887 F.2d 308 (D.C. Cir. 1989). It is reprinted, along with the judgment of the Court, in the

Appendix hereto as App. A, *infra*, 1a-17a. The decision and order below of the National Labor Relations Board is reported at 290 NLRB No. 19 (1988), affirming the decision of Administrative Law Judge Winifred D. Morio. Those decisions are reprinted in the Appendix hereto as App. B, *infra*, 18a-60a.

JURISDICTION

This case originally came before the District of Columbia Circuit Court of Appeals upon the petition of Clark & Wilkins Industries, Inc. (hereafter "Petitioner") for review of an order of the National Labor Relations Board (hereafter "Respondent" or the "Board"), pursuant to Section 10(f) of the National Labor Relations Act, as amended (hereafter the "Act"), 29 U.S.C. Section 160(f). Respondent filed a cross-application for enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. Section 160(e).

By opinion dated and entered October 13, 1989, the Circuit Court granted Respondent's cross-application for enforcement and denied the petition for review. Petitioner's petition and suggestion for rehearing *en banc* was also denied by orders dated and entered January 17, 1990. Those orders are reproduced in the Appendix hereto as App. C, *infra*, 61a-62a.

The jurisdiction of this Court to review the judgment and opinion of the District of Columbia Circuit is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Sections 2(11), 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. Sections 152(11), 158(a)(1) and 158(a)(3):

> Sec. 2.
>
> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer –
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [Section 157 of this title];
>
> . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided

in Section 9(a) [Section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in Section 9(e) [Section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

STATEMENT OF THE CASE

Petitioner is a New York corporation with its principal place of business located at 1871 Park Avenue, New York, New York and is engaged in the business of providing general contracting services in the construction industry.

A petition for an election in Case No. 2-RC-19908 was filed by Local 455 (hereafter the "Union") with the Board on February 7, 1985 seeking to represent Petitioner's production and maintenance employees. At a conference before the Board on February 25, 1985, the parties reached agreement for a Stipulation For Certification Upon Consent Election. The parties agreed that two employees, Cessil Chinfloo and Phillip Greene, would vote subject to challenge inasmuch as there was a dispute as to whether they had been discharged or laid off. The Union contended they had been laid off and thus were eligible to vote.

On March 20, 1985, the election was conducted resulting in six (6) votes for the Union, six (6) votes against the Union with the two (2) challenged ballots of Chinfloo and Greene being determinative. Thereafter, the Region conducted an investigation of the challenged ballots in which it sought to determine whether or not these two individuals had been temporarily laid off or discharged. On April 9, 1985, the Regional Director issued a Notice of Hearing to determine the validity of the challenges.

On April 22, 1985, the Union filed a charge in Case No. 2-CA-21012 alleging that Greene and Chinfloo had been laid off in violation of Section 8(a)(1) and (3) of the Act. On July 3, 1985, the Regional Director issued the complaint herein alleging that Greene and Chinfloo had been discharged in violation of Section 8(a)(1) and (3) of the Act and scheduling a hearing for October 15, 1985. On July 9, 1985, the Acting Regional Director consolidated the unfair labor practice hearing with the hearing on the challenged ballots. A hearing on the complaint took place on October 15, 24, 25 and 31, 1985 before Administrative Law Judge Winifred D. Morio.

On March 31, 1986, ALJ Morio issued her decision in this case. Despite discrediting General Counsel's witnesses in substantial

part, she nonetheless found that Petitioner violated Section 8(a)(1) and (3) of the Act by discharging Greene and Chinfloo. Accordingly, on May 7, 1986, Petitioner filed exceptions to the decision of ALJ Morio and an accompanying memorandum of law with the Board. Petitioner contended that Respondent violated Petitioner's right to due process of law by basing its finding of unfair labor practices on the supervisory status of a certain employee, Uriel Brown, whose alleged knowledge of union activities was imputed to Petitioner. Throughout the hearing, Respondent had taken the position that Brown was not a supervisor and changed its position only in its post-hearing brief. Petitioner did not have adequate notice of General Counsel's change of position and did not have the opportunity to establish at the hearing that Brown was not a supervisor. Accordingly, the issue of Brown's supervisory status was neither fully nor fairly litigated at the hearing. Over two years later, on July 29, 1988, the Board issued its decision affirming the decision of the ALJ.

That decision directed Petitioner, among other things, to cease and desist from any further violation of the Act, offer reinstatement with back pay to Greene and Chinfloo, and directed the Regional Director to open and count the challenged ballots cast by these employees and issue a revised tally of ballots. On August 15, 1988, a revised tally of ballots issued showing a majority of valid votes plus challenged ballots had been cast for the Union. On August 15, 1988, the petition for review herein was docketed. On August 23, 1988, the Regional Director issued a Certification of Representative. On September 21, 1988, Respondent filed a cross-application for enforcement of its order.

By opinion dated October 13, 1989, the D.C. Circuit granted Respondent's cross-application and denied the petition for review. Petitioner's petition and suggestion for rehearing *en banc* was also denied on January 17, 1990.

REASONS FOR GRANTING THE WRIT

RESPONDENT VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW BY BASING ITS FINDING OF UNFAIR LABOR PRACTICES ON BROWN'S SUPERVISORY STATUS

Rule 10.1(a) of the Supreme Court Rules states that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor," which include, but are not limited to, the situation "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." This is the situation presented in the instant case.

The Circuit Court's denial of the petition for review herein not only conflicts with that Court's prior decisions in *G.W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988); *International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, Local No. 111 v. NLRB*, 792 F.2d 241 (D.C. Cir. 1986); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8 (D.C. Cir. 1985); *Conair Corp. v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984); *NLRB v. Blake Construction Co., Inc.*, 663 F.2d 272 (D.C. Cir. 1981); *Amalgamated Meat Cutters & Butcher Workmen of N.A., AFL-CIO, Local 576 v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980) and *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968), but also squarely conflicts with decisions of other Circuits in *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir. 1987); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984); *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267 (10th Cir. 1980) and *Drug Package, Inc. v. NLRB*, 570 F.2d 1340 (8th Cir. 1978).

This case is of paramount importance because of the ongoing practice of the Board in trying cases by ambush, as evidenced by the above-cited cases. The Circuit Court's opinion, if allowed to stand, would provide a major loophole to the Board in continuing its practices in this regard. Consequently, Petitioner

respectfully submits that the need to reconcile this inconsistency among the Circuits coupled with the paramount importance of this case warrant granting this petition.

The decision of the ALJ that Petitioner violated the Act, as adopted by the Board and D.C. Circuit, hinged totally on her finding that Uriel Brown was a supervisor within the meaning of Section 2(11) (29 U.S.C. Section 152(11)) of the Act. As a result of this finding of supervisory status, the ALJ imputed to Petitioner Brown's "knowledge" of the union activities of Greene and Chinfloo.

However, the complaint did not allege that Brown was a supervisor, and at no time in the hearing did General Counsel claim that Brown was a supervisor. Furthermore, the ALJ failed to consider the fact that in the consolidated representation proceeding, the parties had stipulated Brown to be an eligible voter and that Brown had, in fact, voted in the election. In fact, the Regional Director had approved a stipulation in the *same case* that Brown was not a supervisor.

It was only in General Counsel's post-hearing brief that it raised for the first time its contention that Brown was a supervisor. Petitioner did not have the opportunity to present evidence at the hearing that Brown was not a supervisor or to argue at the hearing or in its post-hearing brief that Brown was not a supervisor.[1] Nevertheless, the Board rejected Petitioner's exceptions in this regard, finding "that the issue of Brown's supervisory status was fully and fairly litigated at the hearing." (App. B at 19a n.2).[2]

However, while the Board's findings in this regard may be entitled to great weight, that does not negate the fact that the ALJ did not have all the facts before her. If Petitioner were allowed to fully explore this issue, the ALJ might have reached

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[1] The Board's Rules and Regulations do not provide for the filing of reply briefs to the ALJ.

[2] As used herein, "App. ____" refers to pages of the Appendices annexed hereto.

a different conclusion on Brown's status. *Of course, the same result might have been reached, but the point is that Petitioner was entitled to that opportunity.* Under these circumstances, it cannot be said that Brown's supervisory status was "fully" litigated.

There is even less basis to assert that the issue was "fairly" litigated. Despite ample opportunity to do so, General Counsel did not amend the complaint to include such an allegation. Petitioner had absolutely no notice of General Counsel's change in position or opportunity to establish that Brown's authority fell short of supervisory status.

The Circuit Court's conclusion that "given the nature of the allegations made by the union, [Petitioner] should have known that Brown's status might be litigated" is mystifying (App. A at 13). There was absolutely no basis upon which to conclude that Petitioner should have known General Counsel was going to change its position. Petitioner never attempted to relitigate Brown's lack of supervisory status, which had been agreed upon in a prior stipulation.

The D.C. Circuit has held in previous similar cases that the Board's conduct violated the due process rights of employers. *See generally NLRB v. Blake Construction Co., Inc.*, 663 F.2d 272, 280 (D.C. Cir. 1981) (employer's due process rights were violated where General Counsel failed to raise charge in the complaint or at the hearing); *International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, Local No. 111 v. NLRB*, 792 F.2d 241, 245 (D.C. Cir. 1986) (employer's due process rights were violated where violation was neither charged in the complaint nor litigated in the subsequent hearing, even though all the factual elements necessary to sustain the uncharged violation were included in the complaint); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8, 16 (D.C. Cir. 1985) (Board lacks authority to provide a remedy for a violation established by the evidence but not charged in the complaint because "[w]e do not know, then, what the evidence would have shown had the union been afforded an opportunity to contest the point."); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1372 (D.C.

Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984) (the mere presence of evidence in the record to support an unstated charge does not mean that the party against whom the charge was made had notice that the issue was being litigated, as all doubt should be resolved in favor of the employer). *See also G.W. Galloway Co. v. NLRB*, 856 F.2d 275 (D.C. Cir. 1988) (Board did not have jurisdiction to consider violations not alleged in the charge); *Amalgamated Meat Cutters & Butcher Workmen of N.A., AFL-CIO, Local 576 v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980) (lack of notice prevented General Counsel's theory from being fully and fairly litigated); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970); *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256 (D.C. Cir. 1968) (an agency may not change theories in midstream without giving respondents reasonable notice of the change).

In the opinion below, the Circuit Court distinguished its prior precedent from the instant case on the grounds that those decisions involved a change in the *theory* of liability, as opposed to merely the *evidence* used to prove a particular theory (App. A at 13 n.16). Petitioner respectfully submits that this transparent distinction should not be endorsed. General Counsel's "theory of the case" was that Brown was a supervisor whose knowledge of union activity should be imputed to Petitioner. Brown's status was crucial to this case. In fact, without Brown's imputed knowledge, no violation could be found. Even the Court characterized Brown as the "conduit" through whom Petitioner learned of the employees' union activities (App. A at 12). The "theory" was whether Brown was a supervisor. That required a legal conclusion based upon evidence. The "evidence" was the testimony about Brown's duties, albeit incomplete, relied upon to establish his status; not the determination of supervisory status itself.

Other Circuits have encountered this same problem with Board decisions and have reached different conclusions then that reached herein. In *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984), the Sixth Circuit found that a variance violated due process where the company counsel had received notice of the new claim only a few days before the hearing. In

Stokely-Van Camp., Inc. v. NLRB, 722 F.2d 1324 (7th Cir. 1983), the Circuit Court held that a due process violation occurred when the respondent company was first informed of the different charge in General Counsel's post-hearing brief. *See also NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267 (10th Cir. 1980) and *Drug Package, Inc. v. NLRB*, 570 F.2d 1340 (8th Cir. 1978), in which cases due process violations were found.

In *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981), petitioners challenged several Board unfair labor practice findings against them as violative of due process, in that these violations were not charged in the General Counsel's amended complaint. The First Circuit concluded in this regard that "[t]hus, the test is one of fairness under the circumstances of each case – whether the employer knew what conduct was in issue and had a fair opportunity to present his defense." *Id.* at 1074. That Court went on to find that an 8(a)(5) (29 U.S.C. Section 158(a)(5)) violation not alleged in the complaint was not "fully litigated," noticing that there was nothing in the record which suggested that the employer had notice at the hearing that its good faith in dealing with the union was at issue. *Id.*

Similarly, in *NLRB v. Complas Industries, Inc.*, 714 F.2d 729 (7th Cir. 1983), the Court held the employer was denied due process when the Board was allowed to amend its original complaint to include an additional allegation where the original complaint did not give any indication of such a claim. The Court concluded that:

> Due process is not satisfied by giving respondent a mere opportunity to question witnesses without a prior opportunity to prepare a meaningful defense. . . . 'The evil . . . is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the *opportunity* to present argument under the new theory of violation, which must be supplied.' *Rodale Press, Inc. v. FTC*, 407 F.2d at 1257.

Id. at 734 (emphasis original).

In *NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542 (7th Cir. 1987), a case analogous to the instant action, the Board complaint alleged that Quality had discharged two employees in violation of Section 8(a)(1) (29 U.S.C. Section 158(a)(1)) because they had refused to perform physically dangerous work. The ALJ concluded that this was the only issue litigated, that the work conditions were safe and that no violation had occurred. *Id.* at 543-44. The General Counsel subsequently filed exceptions to the ALJ's decision claiming for the first time that the employees were discharged for protesting "uncomfortable" working conditions. The Board held that the parties had fully litigated the question of whether the employees were discharged for protesting "*uncomfortable*" work conditions, as opposed to the "*unsafe*" working conditions alleged in the complaint, and thus the company had committed an 8(a)(1) (29 U.S.C. Section 158(a)(1)) violation. *Id.* at 544-45.

The Seventh Circuit reversed the Board, and held that the employer's due process rights were violated where: (1) the complaint did not allege such a violation; (2) the complaint was never amended to reflect such a charge; (3) General Counsel never raised such a charge at the evidentiary hearing; and (4) the first notice the company received of the new allegations was in the post-hearing brief filed with the Board excepting to the ALJ's decision. *Id.* at 545-49. The Court relied upon its *Complas Industries* decision and conducted a two-prong analysis: First, did the pleadings, as amended, provide adequate notice of the charge; if not, second, was the new charge nevertheless fully litigated at the hearing so as to provide proper notice?

The Court emphasized that although both charges were phrased as Section 8(a)(1) (29 U.S.C. Section 158(a)(1)) violations, "unsafe" did not equal "uncomfortable." The Court held that the company justifiably only prepared for and presented evidence on the unsafe charge, and that had it received timely notice of the alternative claim, it could have prepared and

presented other evidence regarding that specific charge. *Id.* at 546-49.

Similarly herein, Petitioner litigated this case with absolutely no notice that there was any possibility that Brown might be found to be a supervisor. As in *Quality*, (1) the complaint did not allege that Brown was a supervisor; (2) the complaint was never amended to reflect such an allegation; (3) General Counsel never raised this issue at the hearing; and (4) the first notice Petitioner received of this new allegation was in General Counsel's post-hearing brief. This constitutes a violation of the concepts of fundamental fairness and due process of law. Due process concerns itself with both the appearance and reality of fairness. See *NLRB v. Complas Industries, supra.* In the instant case, there was neither. However, despite the apparent similarities between the instant case and *Quality*, the Circuits reached incongruous results.[3]

Petitioner urges that this Court grant its petition herein so that this divergence among the Circuit Courts may be reconciled. It is apparent from the numerous cases cited above that the issue of the Board amending its complaint or its theory of the case at the last minute, in hearing or even post-hearing, is an issue which arises again and again.

The expedience and efficiency of administrative agency proceedings will not be compromised by establishing a requirement that such agencies provide actual, prior notice of the allegations against respondents. For example, in the instant case, there was no reason why General Counsel should not have been required to amend the complaint prior to the hearing. Unless the Supreme Court adopts the stricter approach of the Seventh Circuit, the Board will continue to abuse its status as an administrative agency to derive an unfair advantage in litigation.

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[3] In fact, the opinion below completely neglected to mention the *Quality* decision.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1602 September Term, 1989

Clark & Wilkins Industries, Inc., Petitioner

v.

National Labor Relations Board, Respondent

Shopmen's Local Union No. 455, et al., Intervenors

FILED OCT 13 1989

CONSTANCE L. DUPRÉ
CLERK

PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: WALD, *Chief Judge*, and BUCKLEY and SENTELLE, *Circuit Judges*.

J U D G M E N T

This cause came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petition for review is denied, and the cross-application for enforcement is granted, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ Constance L. Dupré
CONSTANCE L. DUPRÉ, CLERK

Date: October 13, 1989

Opinion for the Court filed by Chief Judge Wald.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 1989 Decided October 13, 1989

No. 88-1602

CLARK & WILKINS INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

SHOPMEN'S LOCAL UNION NO. 455, *et al.*, INTERVENORS

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Martin Gringer, was on the brief, for petitioner.

Elliot J. Mandel, also entered an appearance, for petitioner.

Judith A. Dowd, Attorney, National Labor Relations Board, with whom *Aileen A. Armstrong*, Deputy Associate General Counsel and *Frederick Havard*, Attorney, National Labor Relations Board, were on the brief for respondent.

Joseph H. Bornong, Attorney, National Labor Relations Board, also entered an appearance for respondent.

Susan Martin was on the brief, for intervenors.

Before WALD, *Chief Judge*, and BUCKLEY and SENTELLE, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge*: Clark & Wilkins Industries, Inc. ("Clark" or "Company"), petitions for review of a decision by the National Labor Relations Board ("NLRB" or "Board"), finding the company liable under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA" or "Act") for discharging Phillip Greene and Cecil Chinfloo for engaging in union activity, in violation of §§ 8(a)(1) and 8(a)(3) of the Act. We affirm the Board's decision and accompanying order.

I. BACKGROUND[1]

Clark & Wilkins Industries, Inc. is a small general contracting firm located in New York City. The company consists of Jack Roth, its president, Walter Wardrop, its steel superintendent, two leadmen, including Uriel Brown and 15 crew members, including Phillip Greene and Cecil Chinfloo.

As steel superintendent, Wardrop is responsible for the fabrication of iron products in the company's shop. When the iron product is ready for installation, Wardrop takes a leadman to the installation site and tells him how the

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[1]The following facts were found by Administrative Law Judge ("ALJ") Morio, Joint Appendix ("J.A.") 12-33, and affirmed by the Board.

work is to be done. A complement of the company's crew is then assigned to work under the leadman at the job site. The leadman directs the work at the jobsite and is responsible for its proper completion. At the end of the day the leadman reports to Wardrop on both the progress made and problems encountered at the jobsite.

In the mornings, before heading out to jobsites, the crew members and the leadmen change into their work clothes in a locker room in the company's shop. In the evenings, they return to the locker room where they change back into their street clothes. On Fridays, the employees and the leadmen generally go to a bar together.

A. *Greene's Discharge*

On January 30, 1985, Greene met with approximately eight of his fellow crew members in the company's locker room to discuss both the potential benefits of unionizing and the possibility of holding an election.[2] Chinfloo attended the meeting. Although the crew members generally left work at 4:30 P.M., they did not leave the locker room that day until about 5:10 P.M. Wardrop was standing at the door as they filtered out.

On January 31, Greene, Chinfloo and two other employees were assigned to a work crew under leadman Brown. The crew was instructed to put up a fence at a site near Central Park. Greene, Chinfloo and one other crew member worked on one part of the fence while Brown and the other crew member worked on another part.

In the afternoon, Wardrop visited the jobsite and inspected the work in progress. Before leaving, he spoke privately with Brown. Subsequently, Brown criticized Greene's and Chinfloo's work. Greene got angry and told Brown that he was "tired of being used" and that he would "take steps ... to change that." J.A. 69. Brown

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[2]The union Greene discussed with the other crew members is Shopmen's Local Union No. 455, International Association of Bridge, Structural and Ornamental Workers, AFL-CIO.

replied that "any steps or anything you guys are going to do do not include me." *Id.*

After returning to the locker room at the end of the day, Brown and Greene argued about Brown's criticism at the jobsite. As Brown left the locker room, Wardrop asked him what was the matter. Brown explained what happened at the jobsite and said he had thought the matter was closed until Greene reopened it in the locker room. The next morning, February 1, Wardrop dismissed Greene.[3]

B. *Chinfloo's Discharge*

Chinfloo worked at various company jobsites and also drove a company truck. Chinfloo had recently immigrated from the West Indies and thus was unfamiliar with the city. On approximately February 4, Wardrop asked Chinfloo to pick up some debris at a company jobsite. Chinfloo did not know how to get to the jobsite and consequently had to follow Wardrop to the spot.

On February 6, Antonio Schifano, a union representative, met with Jack Roth in Roth's office. Schifano told Roth that several of Clark's employees had signed union authorization cards and asked Roth to begin bargaining with the union. Roth told Schifano that he could not afford a union but Schifano nonetheless persuaded Roth to meet him the next day to discuss the matter further. Later that day, Wardrop dismissed Chinfloo.[4] Subse-

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[3]Greene testified that when Wardrop let him go, Wardrop told him that a big job was coming up and when it did he would be recalled, the implication being that his dismissal was the result of a temporary shortage of work. J.A. 74. While Judge Morio did not specifically credit this testimony, she did explicitly find that Wardrop told Greene he was being laid off and did not tell him he was being discharged. J.A. 31.

[4]Chinfloo testified that upon being dismissed, Wardrop told him that he was a good employee and would be recalled in a matter of weeks. Like Greene, the inference Chinfloo drew from this statement was that the layoff was the result of a temporary shortage of work. J.A. 105. Moreover, Chinfloo testified that Wardrop

quently, Roth cancelled his February 7 meeting with Schifano. Consequently, the union filed a petition for a representation proceeding with the Board on behalf of Clark's crew members.

C. *The Representation Election*

On February 25, prior to the representation proceeding, the parties took part in a conference on the voting eligibility of Greene and Chinfloo. The company contended that Greene and Chinfloo were ineligible to vote because they had been discharged for cause. The union maintained that they had been unlawfully discharged and were thus eligible to vote. The Board then commenced a hearing on the status of Greene and Chinfloo, only to terminate it because the parties entered into an agreement allowing Greene and Chinfloo to vote subject to challenge. The election, in which Brown participated, was held on March 20, resulting in a 6-6 tie. The challenged ballots of Greene and Chinfloo were therefore determinative of the outcome of the election.

Before a hearing on the challenged ballots was held, the union filed the unfair labor practice charges at issue in this case, alleging that Greene and Chinfloo were unlawfully discharged. On July 9, the Board issued an order consolidating the hearing on the challenged ballots with the unfair labor practice hearing.

D. *The Hearing Before the ALJ and the Board's Decision*

At the hearing before Judge Morio, Clark contended that Greene was fired for insubordination and Chinfloo for incompetence. Judge Morio disagreed, finding the company liable under §§ 8(a)(1) and 8(a)(3) of the Act because the union had shown, as required by *Wright Line*,

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said nothing to him about his inability to find the jobsite on February 4. J.A. 107. As with Greene, Judge Morio did not specifically credit this testimony but did explicitly find that Wardrop told Chinfloo he was being laid off and did not tell him he was being discharged. J.A. 31.

A Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), *enforced, NLRB v. Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied, NLRB v. Wright Line*, 455 U.S. 989 (1982), that Greene's and Chinfloo's union activity were a motivating factor in Clark's decision to discharge them and Clark had failed to show that it would have discharged them notwithstanding their union activities.[5] In support of her decision, Judge Morio first found that the company, through leadman Brown, knew of Greene's and Chinfloo's union activity. The ALJ imputed Brown's knowledge to the company because she found Brown to be a company supervisor as defined by § 2(11) of the Act.[6]

Judge Morio also found that the timing of Greene's and Chinfloo's respective dismissals indicated that they were discharged for engaging in union activity. Finally, Judge Morio found evidence of Clark's hostility toward unions, indicating that the company was inclined to dismiss employees for engaging in union activity.

In a brief opinion, the Board affirmed the ALJ's "rulings, findings and conclusions." J.A. 45.[7]

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[5]Section 8 of the Act provides in relevant part:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; ...

(3) by discrimination in regard to hire or tenure of employment or any terms or conditions of employment to encourage or discourage membership in any labor organization ....

[6]Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment.

[7]The Board's decision, however, does not explicitly address the ALJ's finding of anti-union animus.

II. ANALYSIS

Clark argues that in finding for Greene and Chinfloo, the Board erred in both its factual and legal conclusions.

On factual grounds, Clark argues that the record lacks substantial evidence to support the Board's finding that the company dismissed Greene and Chinfloo for engaging in union activity. But even if there were substantial evidence to that effect, the company contends that the record shows Clark had legitimate reasons for firing Greene and Chinfloo.

On legal grounds, Clark argues that its due process rights were violated because the union's complaint did not allege that Brown is a supervisor within the meaning of § 2(11) of the Act and thus the company did not have notice that Brown's status was in issue. While Clark recognizes that this alleged defect in the union's complaint would have been harmless had Brown's employment status been fully and fairly litigated before Judge Morio, it asserts that it was not. Clark also contends that the union was precluded from relitigating the status of Brown because the union's complaint did not allege that Brown is a supervisor and for purposes of the representation proceeding, the union and the company had stipulated Brown to be an eligible voter[8] and therefore by definition not a supervisor.

We will address each contention in turn.

A. *Issues of Fact*

In evaluating the Board's factual findings, a reviewing court may not disturb the Board's conclusions where they are supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Under this standard, so long

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[8]While the company asserts that the parties stipulated Brown to be an eligible voter, Clark & Wilkins Brief at 29, there is no evidence in the record of this stipulation and the Board neither confirms nor contests its existence. However, the Board does confirm that Brown voted in the election. NLRB Brief at 23.

as the Board's findings are *reasonable*, they may not be displaced on review even if the court might have reached a different result had the matter been before it *de novo*. *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968). Notwithstanding Clark's assertion to the contrary, the Board's determination that Chinfloo and Greene were discharged for engaging in union activity was clearly reasonable.

1. *Knowledge*

The Board found company knowledge of Greene's and Chinfloo's union activity by imputing leadman Brown's knowledge to the company. It justified this imputation by concluding that Brown is a supervisor within the meaning of § 2(11) of the Act.[9]

The Board's finding that Brown knew of Greene's union activity was based primarily on an eminently reasonable inference it made from the exchange that took place between Brown and Greene at the worksite after Brown criticized Greene's work. Brown's comment—"any steps or anything you guys are going to do do not include me"—clearly indicates that he understood Greene's remark—taking "steps"—to refer to his union activities. J.A.69. If this were not the case, Brown would not have addressed his response to "you guys," since Greene protested Brown's criticism in the first-person singular: "*I'm*

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[9]Clark rejects the Board's summary acceptance of Judge Morio's imputation of Brown's knowledge to the company, arguing that Brown is not a supervisor within the meaning of § 2(11) of the Act.

Even if Brown's employee status were a close call, as the Supreme Court has explained, ". . . the gradations of authority 'responsibly to direct' the work of others . . . are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of supervisor." *Marine Engineers Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962) (quoting with approval from *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)).

tired of being used" and "steps *I* would make to change that." *Id.* (emphasis added).

The Board also inferred from this exchange that Brown knew of Chinfloo's union activities because Chinfloo was on Brown's work crew that day. While we find this inference less well-founded—there was a third member of the work crew who was not subsequently fired—it was reasonable for the Board to conclude as it did. The evidence discussed below regarding the timing of Chinfloo's dismissal supports the Board's finding with regard to Chinfloo.[10]

2. *Timing*

The Board reasonably concluded that "[Clark's] asserted justification for Greene's discharge was trumped up from events occurring the very morning after his activity in support of the union—events which even Brown made clear he considered trivial, and which the ALJ found to be pretextual. Chinfloo's discharge occurred only hours after the respondent was confronted by the union with a demand for recognition." J.A. 47-48.[11]

Clark attempts to explain away these coincidences in

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[10]The Board also invoked the "small shop" theory in finding that Brown knew of Greene's and Chinfloo's union activity. Under this theory, where a small company is at issue, evidence showing the small number of employees and the close working and social relationship between a company supervisor and its employees supports an inference of company knowledge of union activity. *See NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986). Here, the Board recognized that "Brown . . . spent a considerable amount of time with the *small complement* of unit employees both on and off the job." J.A. 47 (emphasis added).

[11]The Board also relied on these findings in determining that Clark would not have dismissed Greene or Chinfloo absent their union activity. In reaching this conclusion, however, the Board also invoked Judge Morio's credibility determinations: "Having discredited Wardrop's confused and self-contradicting testimony and thus finding that his asserted reasons for the discharges were false, the judge properly inferred that the real reason was an unlawful one." J.A. 48. As noted below, this court must accord great deference to the ALJ's credibility determinations.

timing primarily by attacking the credibility of the union's witnesses. In finding for the union, however, Judge Morio addressed the credibility issue and "under the law of [the D.C. Circuit], it is clear that Board-approved credibility determinations of an ALJ are entitled to be upheld unless they are 'hopelessly incredible or self-contradictory.'" *Teamsters v. NLRB*, 863 F.2d 946, 953 (D.C. Cir. 1988), *cert. denied, A. G. Boone Co. v. NLRB*, 109 S. Ct. 2063 (1989).[12]

B. *Issues of Law*

The company asserts that its due process rights were violated because the union's complaint did not allege Brown to be a supervisor and because Brown's employee status was not fully and fairly litigated before the ALJ. We agree with the Board that Brown's status was fully and fairly litigated before Judge Morio. J.A. 46 n.2. We will now discuss the alleged deficiency in the union's complaint.

It is clear that the union's complaint was sufficient as measured by the Board's regulation governing the sufficiency of complaints. 29 C.F.R. § 102.15 requires a union to name in its complaint only those agents "by whom" a party is alleged to have committed unfair labor practices.[13]

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[12]Moreover, as Judge Morio stated, deciding whom to believe about what in this case was particularly difficult:

> All counsel agree that the case presents credibility issues, but each contends that the witnesses who testified in support of their position were completely trustworthy and it was the witness for the other side who slanted the truth. Unfortunately, the resolution of the credibility issue in this case is not simple. My observation of the demeanor of all the witnesses and my examination of the record convinces me that witnesses for both sides tended to tell only part of the truth.

J.A. 24.

[13]29 C.F.R. § 102.15 provides in relevant part:

> The complaint shall contain (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the

The union never contended that Brown committed any unfair labor practices. Rather, Brown was merely the conduit through whom the company's principals, Roth and Wardrop, learned of Greene's and Chinfloo's union activity. It was Roth and Wardrop who fired Greene and Chinfloo, thus it was Roth and Wardrop "by whom" the unfair labor practices at issue were committed. The union named both Roth and Wardrop in its complaint. J.A. 4. Moreover, Brown's employee status was fully and fairly litigated at the hearing and thus Clark had adequate notice that Brown's status was in issue.

As the Board points out, NLRB Brief at 12, not only was the issue of Brown's status litigated at the hearing, it was raised by the company. The company put both Brown and Wardrop on the stand in an effort to counter assertions by Greene that Brown had no authority over him. J.A. 70, 77, 78. The company's aim was to prove that since Greene was responsible to Brown, Greene's defiance of Brown both at the worksite and in the locker room constituted insubordination and was the reason for Greene's dismissal. The company's strategy backfired, however, as Brown's, J.A. 139-44, and Wardrop's, J.A. 158, testimony indicated that Brown is a supervisor.[14]

On its cross-examination of Brown, J.A. 188-91, and Wardrop, J.A. 165-71, 173-74, 182, the union took advantage of this opening, eliciting considerable testimony to support the conclusion that Brown is a supervisor.[15] Clark

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Board is predicated and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

[14]For example, Brown testified that he was "totally responsible for" and "in charge of" the job to be performed. J.A. 140, 143. Wardrop testified that "in the work that we do, a leadman is a key man . . . he runs the job for me." J.A. 158.

[15]Brown testified that "I was supposed to supervise the jobs that I was on while I was out in the field." J.A. 188. Wardrop testified that "I hold all my leadmen responsible for the jobs," J.A. 174, and "the leadman runs the job and [employees] are to help him and assist the best [they] can." J.A. 182.

could have recalled Brown and Wardrop to rebut the evidence adduced by the union on cross-examination, but as it concedes, it did not take advantage of that opportunity. Clark & Wilkins Brief at 14.

Clark's contention that it did not recall its witnesses because "throughout the hearing General Counsel took the position that Brown was not even a leadman" is without merit. *Id.*

First, the record does not support this characterization of General Counsel's position. Second, and more important, given the nature of the allegations made by the union, Clark should have known that Brown's status might be litigated. By definition, to prevail on §§ 8(a)(1) and 8(a)(3) charges, a petitioner must prove company knowledge of union activity. The ebb and flow of examination and cross-examination would have made it clear to anyone familiar with §§ 8(a)(1) and 8(a)(3) actions that Brown's status was up for grabs.

But even if Clark remained blissfully ignorant of whose knowledge was being litigated, the General Counsel was not required to announce at the hearing that the primary evidence it intended to adduce to prove company knowledge was the fact that Brown is a supervisor. Clark has not cited any cases holding that a party before the Board must tell its opponent what evidence it plans to use to prove its theory of liability.[16]

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[16]The cases the company cites in support of its argument that Brown's status was not fully and fairly litigated are inapposite.

In *G.W. Galloway Co. v NLRB*, 856 F.2d 275 (D.C. Cir. 1988); *International Association of Bridge, Structural, Ornamental Iron Workers, AFL-CIO Local No. 111 v. NLRB*, 792 F.2d 241 (D.C. Cir. 1986); *Road Sprinkler Fitters Local Union No. 669 v. NLRB*, 778 F.2d 8 (D.C. Cir. 1985); *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223 (D.C. Cir. 1980); and *Rodale Press, Inc. v. FTC*, 407 F.2d 1252 (D.C. Cir. 1968), this court overturned the Board for grounding its finding of liability in a *theory* other than that alleged by petitioner. In *Galloway*, this court overturned the Board for issuing a complaint to the employer because

Finally Clark asserts that the Board gave an incomplete statement of the law when it affirmed Judge Morio's reconsideration of Brown's employment status.[17] Accord-

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the employer had unlawfully coerced striking workers to return to work where petitioner's *theory* of liability was that an employee had been unlawfully discharged. In *Road Sprinkler*, we overturned the Board for grounding its finding of liability in the *theory* that the company had unlawfully failed to rehire where the union's *theory* of liability was unlawful discharge. In *International*, the Board found liability on both *theories* of direct and indirect coercion where the union's complaint had alleged only, and in great detail, direct coercion. In *Amalgamated*, we reversed the Board for grounding liability in the *theory* that the employer failed to notify the union that it was going out of business where the union had relied on the *theory* that the employer never ceased doing business by continuing to operate through its alter ego. In *Rodale*, we overturned the Board for grounding liability in the *theory* that the advertising in issue misrepresented the contents of the book where petitioner's *theory* was that the misleading advertisements repeated misleading health tips given in the book. Here the union's *theory* is, and has always been, that the company discharged Greene and Chinfloo because it had knowledge of their union activity. Brown's supervisory status is only *evidence* to prove the theory of liability, not a theory of liability in and of itself.

In *NLRB v. Blake Construction*, 663 F.2d 272 (D.C. Cir. 1981), we reversed the Board because it had imposed additional liability on Blake for its unlawful dealings with employees that Blake had no idea were in issue. Here, Clark knew from the outset that Greene and Chinfloo were contesting their respective discharges. *In Conair v. NLRB*, 721 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984), we reversed the Board for grounding liability in a § 8(a)(3) violation where the petitioner originally alleged only a § 8(a)(1) violation.

[17]In upholding Judge Morio's determination that Brown is a supervisor, the Board said: "Failure to request review of a Regional Director's approval of a stipulation for a consent election has preclusive effect only to *related* subsequent unfair labor practice proceedings (*i.e.*, § 8(a)(5) refusal-to-bargain cases), and that subsequent unfair labor practice proceedings involving § 8(a)(1) and § 8(a)(3) such as the instant proceeding are not related unfair labor practice proceedings." J.A. 46 n.2 (emphasis added).

ing to Clark, the law precluded both the ALJ and the Board from reconsidering Brown's status because "whe[n] an individual is found to be an employee in a representation proceeding, the question of his status may be relitigated in an unfair labor practice proceeding *only where* there is a specific allegation in the complaint that the employee is a supervisor and is alleged to have committed unfair labor practices." Clark & Wilkins Brief at 28-29 (emphasis added).[18] This proposition merits little discussion, as two of the cases Clark cites in support undermine its argument and the third is unhelpful.

For example, it cites *Reeves Bros.*, 277 N.L.R.B. 1568, 1573 n.3 (1986), where the ALJ found that because as here, the unfair labor practice proceeding contained issues "unrelated to issues in the representation case, the status of the leadman is the proper subject of relitigation."

Clark also cites *Herb Kohn Electric Co. v NLRB*, 272 N.L.R.B. 815 n.5 (1984), which reads in relevant part: "It

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The controversy over what is a "related" proceeding was spawned by the Board's issuance, in 1966, of the following regulation:

> Section 102.67(f): Failure to request review [of a Regional Director's consent to an election stipulation] shall preclude such parties from relitigating, in any *related* subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.

(Emphasis added.)

[18]The Company does not explicitly state that Brown was found to be a nonsupervisory employee for purposes of the election but the implication is obvious. Moreover, it is correct. While the record does not show that Brown was found to be an employee for purposes of the election, the Board has explained that it is "axiomatic that . . . the Board will not find a statutory supervisor to be eligible to vote in a Board election." *Superior Bakery, Inc.*, 294 N.L.R.B. No. 21, p.2 (1989). And as this court has noted, § 2(3) of the NLRA defines "employee" so as to expressly exclude "any individual employed as a supervisor." *NLRB v. Ship Shape Maintenance Co.*, 474 F.2d 434, 438 n.10 (D.C. Cir. 1972).

is well established that, *even where* an individual has been found in a representation proceeding to be an employee, the question of his or her status may be litigated in a subsequent unfair labor practice proceeding, particularly where, as here, there is a specific allegation that the individual is a supervisor. . . . *Hedison Manufacturing Co.*, 249 N.L.R.B. 791 (1980)." (Emphasis added). In other words, according to the NLRB, while an allegation of supervisory status is helpful, it is by no means necessary.

Finally, Clark cites *Hedison Manufacturing Co.*, 249 N.L.R.B. 791 (1980). In that case, the Board found it unnecessary to make a determination of the status of the employee in issue. And while the Board did say, in *dictum*, that the Board's rules prohibit relitigation of the employee's status "*especially* since general counsel's request for a bargaining order raises essentially the issue of the scope and composition of the appropriate unit which would not be relitigated in a § 8(a)(5) case . . . ." *Hedison* at 800 (emphasis added), it erred in using the word "especially"; the word it should have chosen was "only."

Indeed, *subsequent* Board decisions such as *Reeves* and *Herb Kohn* have recognized, as shown, that relitigation of an employee's status is not precluded in §§ 8(a)(1) and 8(a)(3) proceedings, where the issue being relitigated is "unrelated" to the prior representation proceeding. In fact, the Board's decision in this case explicitly holds that §§ 8(a)(1) and 8(a)(3) proceedings are "unrelated" to representation proceedings. In so holding, it cited this court's opinion in *Amalgamated Clothing Workers of America v. NLRB*, 365 F.2d 898, 904-05 (D.C. Cir. 1966), where the court made the same point. *See also NLRB v. Hydro Conduit Co.*, 813 F.2d 1002, 1003 (9th Cir. 1987) ("The circuit courts that have addressed the issue have concluded that § 102.67(f) does not prevent relitigation in a subsequent §§ 8(a)(1) or 8(a)(3) unfair labor proceeding of issues that were or could have been raised in a representation proceeding.").[19]

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[19]The company finally asserts that Judge Morio's quashing of its subpoena seeking all of its employees' signed authorization

III. CONCLUSION

Substantial evidence on the record as a whole supports the Board's finding that Clark unlawfully discharged Greene and Chinfloo for engaging in union activity, in violation of §§ 8(a)(1) and 8(a)(3) of the Act. The record also shows that Brown's supervisory status was fully and fairly litigated before Judge Morio. Finally, the Board was correct in concluding that Judge Morio was not precluded from revisiting Brown's employment status, notwithstanding the fact that Brown voted in the prior representation proceeding. *Herb Kohn Electric Co. v. NLRB*, 272 N.L.R.B. 815 (1984). We therefore affirm the Board's decision and accompanying order.[20] Consequently, the petition for review is *Denied*.

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cards constituted prejudicial error. Clark & Wilkins Brief at 32, 39. It contends that offering all the signed cards as evidence would have proven that it fired Greene and Chinfloo for cause because it did not fire all of its employees that wanted to unionize.

But an employer's discriminatory motive is not disproved by evidence showing that "it did not weed out all union adherents." *Nachman Co. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

[20]As ordered by the Board, Clark must cease and desist from the unfair labor practices found, offer Greene and Chinfloo reinstatement in their former or substantially equivalent positions, make them whole for any loss of earnings they suffered by reason of discrimination against them and expunge from its files any references to their discharges. Additionally, the NLRB's Regional Director must open and count the ballots cast by Greene and Chinfloo in the representation proceeding. *See* J.A. 42; 32-33.

APPENDIX B

290 NLRB No. 19

SJB
D–8081
New York, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CLARK & WILKINS INDUSTRIES, INC.

and

Cases 2–CA–21012
2–RC–19908

SHOPMEN'S LOCAL UNION NO. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO

DECISION AND ORDER

On March 31, 1986, Administrative Law Judge Winifred D. Morio issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party-Petitioner filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided

to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt her recommended Order as modified.[3]

We agree with the judge that the General Counsel has sustained her burden under *Wright Line*[4] of a prima facie showing

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[1] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent contends that the judge erred in finding Uriel Brown, on whose testimony the judge relies in finding that the Respondent had knowledge of union activity, to be a statutory supervisor because the complaint did not specifically allege that Brown was a supervisor and was not amended to so allege at hearing. The Respondent further contends that, in making her determination as to Brown's supervisory status, the judge failed to consider the parties' stipulation to Brown's voting eligibility in the representation proceeding. We find no merit to these exceptions. First, we find, based on a careful reading of the record, that the issue of Brown's supervisory status was fully and fairly litigated at the hearing. Second, the Board has held that failure to request review of a Regional Director's approval of a stipulation for a consent election has preclusive effect only to *related* subsequent unfair labor practice proceedings (i.e., 8(a)(5) refusal-to-bargain cases), and that subsequent unfair labor practice proceedings involving Sec. 8(a)(1) and (3) such as the instant proceeding are not related unfair labor practice proceedings. *Farm Fans, Inc.*, 174 NLRB 723, 724 (1969); see also *Clothing Workers*, 365 F.2d 898, 902–905 (D.C. Cir. 1966); *Reeves Bros.*, 277 NLRB 1568, 1573 (1986). We find that the judge properly resolved Brown's supervisory status in this proceeding and we affirm her findings in that regard.

[3] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 789 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

that union activity was a motivating factor for the discharges of employees Phillip Greene and Cessil Chinfloo and that the Respondent has failed to demonstrate that these employees would have been discharged even in the absence of their union activity. As found by the judge, the discharges were precipitated by a locker room agreement among employees, including Greene and Chinfloo, on January 30, 1985, to attend a union meeting, and their attendance at that meeting where they signed authorization cards.

Regarding the prima facie case, we find that the General Counsel has established the Respondent's knowledge of employees' union activity by evidence that Brown, a supervisor who spent a considerable amount of time with the small complement of union employees both on and off the job, was aware of the campaign, and we agree with the judge that Brown's knowledge is imputed to the Respondent's steel superintendent, Wardrop. We find support for the finding of knowledge not only in inferences drawn by the judge from the size of the unit and Brown's close relationship with employees and from Brown's incredible denials in seeking to distance himself from his subordinates' union activity, but also in direct evidence of Brown's knowledge contained in Greene's uncontroverted testimony concerning his confrontation with Brown on the construction site the morning before Greene's discharge.[5]

Greene testified that he had become upset after Brown approached the worksite where Greene, Chinfloo, and another employee were erecting fences and doors and criticized the quality of their work. Greene told Brown that he was "tired of being used" and that he would take "steps . . . to change that." Brown replied, in obvious references to the union meeting and solicitation of authorization cards that had taken place the previous evening, that "any steps or anything you guys are going to do, do not include me." This testimony contributes to

[5] Member Babson, in concluding that the Respondent had knowledge of the employees' union activity, finds it unnecessary to rely on the small size of the unit.

establishing not only the Respondent's general knowledge of union activity within the unit but specific knowledge of the participation of the employees to whom Brown's remark was directed, which included Greene and presumably Chinfloo.

The Respondent's asserted justification for Greene's discharge was trumped up from events occurring the very morning after his activity in support of the Union – events which even his supervisor made clear he considered trivial, and which the judge found to be pretextual. Chinfloo's discharge occurred only hours after the Respondent was confronted by the Union with a demand for recognition. The fact that these employees' support for the Union was pivotal in this small unit – their discharges enabling the Respondent to frustrate the Union's efforts to achieve recognition – renders even their modest activities significant.[6] Further, having discredited Wardrop's confused and self-contradicting testimony and thus finding that his asserted reasons for the discharges were false, the judge properly inferred that the real reason was an unlawful one.[7] Accordingly, because the Respondent has not shown that it would have discharged the employees even in the absence of union activity, we affirm the judge's finding that it violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders the Respondent, Clark & Wilkins Industries, Inc., New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(c) and reletter paragraph 2(c) and subsequent paragraphs.

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[6] See *Advance Development Corp.*, 275 NLRB 186, 191, 195 (1985).

[7] See *E. Mishan & Sons, Inc.*, 242 NLRB 1344, 1345 (1979); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

"(c) Expunge from their files any references to the discharges of Phillip Greene and Cessil Chinfloo and notify them in writing that this has been done and that the discharges will not be used against them in any way."

Dated, Washington, D.C. July 29, 1988

James M. Stephens, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD(NY)—13-86
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

CLARK & WILKINS INDUSTRIES, INC.

and

Case 2—CA—21012
Case 2—RC—19908

SHOPMEN'S LOCAL UNION
455, INTERNATIONAL
ASSOCIATION OF BRIDGE,
STRUCTURAL & ORNAMENTAL
IRON WORKERS, AFL-CIO

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DECISION

Statement of the Case

WINIFRED D. MORIO, Administrative Law Judge: This case, heard on 15, 24, 25, 31 October 1985 at New York, New York, was based on a complaint issued by the Regional Director,

Region 2, on 3 July 1985. The complaint alleges, in substance, that Clark & Wilkins Industries, Inc. (Respondent/Company) discharged its employees, Phillip Greene and Cessil Chinfloo, because of their activites on behalf of Shopmen's Local Union #455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO (Union). The Respondent filed an answer in which it denied that it had committed the alleged unfair labor practices.

All parties were afforded the opportunity to present witnesses, to cross-examine witnesses and to file briefs. Briefs were filed by all parties.

On the entire record, including my observation of the demeanor of the witnesses and upon consideration of the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction

At all times material herein, the Respondent, a New York corporation, with a facility located in the City and State of New York was engaged in providing general contracting services in the construction industry. Annually, the Respondent, in the course and conduct of its business operations, purchases and receives goods and materials valued at in excess of $50,000, directly from firms located outside of the State of New York. The parties admit, and I find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The parties also admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Representation Petition

On 7 February 1985, the Union filed a representation petition, in Case 2–RC–19908, seeking to represent all production and maintenance employees of Respondent. At a conference held on 25 February 1985, issues were raised concerning the

status of four employees, Phillip Greene, Cessil Chinfloo, Leslie Earlington and Carrol Dyall. It was the position of the Union that these four employees had been temporarily laid off and, therefore, they were eligible to vote. The Respondent contended that the four employees had been discharged for cause. A hearing was commenced on the 25th of February 1985 with respect to the status of these individuals, but it was terminated when the parties entered into a Stipulation for Certification Upon Consent Election. The parties agreed that Greene and Chinfloo would vote subject to challenge because the Union continued to maintain that the two employees were laid off, while Respondent maintained that they had been discharged.[1] An election was held on 20 March 1985 which resulted in six votes for the union and six votes against the Union. The challenged ballots of Greene and Chinfloo, therefore, were determinative of the election. The Director, on 9 April 1985 issued a Notice of Hearing, in order to determine the status of these two individuals. The hearing, initially, scheduled for 19 April 1985, was postponed to 29 April 1985. On 22 April 1985, the unfair labor practice charge in the instant case was filed, and as noted, on 3 July 1985 the complaint in this case issued. Thereafter, on 9 July 1985 an Order consolidating the hearing on the challeged ballots with the hearing in the unfair labor practice case was issued by the Director.

III. Respondent's Motion to Dismiss the Complaint

During the hearing, Respondent's counsel filed a Motion to Dismiss the Complaint. It was counsel's position that the Union, by proceeding with the election on the basis that Greene and Chinfloo were eligible to vote because they had been temporarily laid off, waived the right to claim, subsequent to the election, that the two employees had been discharged for discriminatory reasons. Counsel argued that the instant case is similar to the situation which existed in *Irving Air Chute*, 149 NLRB 627 (1964)

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[1] The Union, apparently, did not pursue its position about the status of Earlington and Dyall and they did not vote in the election.

where the Board held that when a union loses an election it may not seek a bargaining order pursuant to Section 8(a)(5) of the Act where it had failed to file timely objections to the conduct of the election. Counsel contends that it would be a logical extension of *Irving Air Chute* to hold that where a union proceeds to an election and fails to allege, in a timely manner, that certain individuals are eligible to vote as a result of unlawful discharges, it waives its right to subsequently assert the illegality of such discharges. The Motion to Dismiss was denied. However, counsel requested that he be permitted to amend his answer to include the grounds for his Motion to Dismiss as an affirmative defense. This motion was granted.

IV. The Alleged Unfair Labor Practice

A. *Background*

Phillip Greene commenced his employment with Respondent in June 1983. According to Walter Wardrop, the Respondent's steel superintendent, he discharged Greene in March 1984 because he, together with another employee, drank while on the job and both individuals failed to perform the work assigned to them. Greene claimed that he was laid off and not discharged in March 1984 because of a slowdown in work. Greene did admit, however, that some weeks before he was laid off, both he and another employee were reprimanded by Wardrop because they had failed to perform assigned work and Wardrop told both employees that he did not want them drinking on the job. Although Greene claimed that it was the other employee who was drinking, it does not appear that he told this to Wardrop at the time he was reprimanded. Greene testified that he was unable to perform the assigned work because he did not know how to drive the truck to the jobsites, it was driven usually by the other employee. However, Greene did not explain why he had failed to call Wardrop to explain what had happened.

Uriel Brown, employed by Respondent as a leadman, testified that he had been friendly with Greene. He claimed that Greene told him, that sometime in 1984, he went drinking with another employee and they failed to perform the work assigned to them

and Wardrop was angry with them. At about this time, Greene also told Brown that he had been fired. Although, counsel for the Genral Counsel claimed that Brown, originally, testified that Greene told him he was fired for drinking and, subsequently, testified that he "guessed" Greene was fired for drinking, a careful examination of the record establishes that Brown, in both instances, testified that Greene told him he had been drinking and that he was fired and Brown "guessed" that Greene was fired for drinking on the job.

Greene admitted that between the time he was laid off in March 1984 and June 1984 he knew that Wardrop was hiring employees but did not recall him, however he could not remember if he complained to Wardrop about this failure to recall him. Greene testified that in June 1984, he approached Wardrop and asked to be rehired and he was rehired at that time. According to Uriel Brown and Wardrop, Wardrop rehired Greene only after Brown interceded with Wardrop, told him that Greene needed a job and asked him to hire Greene, which Wardrop did in June 1984.

B. Greene's Alleged Organizing Efforts

Antonio Schifano, the Union's business representative, testified that he was first approached by some of Respondent's employees at the Union hall in December 1984 and they spoke to him about their interest in the Union. It is unclear whether Greene was one of the employees in the group at this first meeting, but Schifano did testify that he knew Greene,[2] because Greene had assisted him with his organizing efforts at another company.[3] Schifano claimed that sometime in December 1984,

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[2] Schifano testified that he had known Greene for some time. However, it appears that Schifano first met Greene a few months earlier when he was organizing B.R.B. Iron Works.

[3] Greene had worked for B.R.B. Iron Works and while there he had signed an authorization card for the Union. He was discharged by that company on 7 May 1984. In Case 29–CA–11244 Administrative Law Judge, Howard Edelman, found Greene's discharge and the discharges of two other employees, Earl Mills and Carrol Dyall to be violative of the Act.

whether it was at this meeting or another is unclear, he gave 12 authorization cards to Greene to distribute to the other employees. According to Schifano, these were the only authorization cards that he gave to Greene. Schifano also testified that during the following weeks he met with Greene once a week, on a Wednesday, to discuss the progress of his organizing efforts.

Greene's recollection of his first meeting with Schifano about organizing Respondent's employees differs from Schifano's recollection. Greene recalled that in early January 1985, he went alone to the Union hall, between 5:30 p.m. and 6:00 p.m., and he spoke to Schifano about organizing the employees. Schifano told him to talk to the "other guys" to see if they were interested and to try to have them sign authorization cards. Schifano gave him two authorization cards to show "as specimens to the other guys." In response to a question about whether these two cards were signed, Greene responded that they were signed in January 1985. Greene testified that within a day or two after he spoke with Schifano he discussed the benefits of joining the Union with three employees at the 125th Street subway station and he gave one of the authorization cards to one of the employees and he kept the other as a sample to show to the other employees. It appears that the employee who Greene claimed he gave the card to was Carrol Dyall. Greene, initially, testified that the employee who took the card at the station did not return it to him until the last week in January. However, in subsequent testimony Greene stated that the employee who took the card at the subway station returned it to him "the second Wednesday in January." In the affidavit secured from Greene during the investigation of the case, Greene stated, "the first card was signed on or about January 28, 1985."[4] In fact, the evidence in the record establishes that authorization cards were signed by Leslie Earlington and Carrol Dyall on the 28th of December 1984 and the 20th of January 1985.[5] Greene, claimed that he secured

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[4] Greene testified that he made a mistake in the affidavit when he said the card was returned on the 28th of January 1985.

[5] Greene claimed that Dyall's card was the first one signed, in fact Earlington's card was the first one signed. Earlington's card, apparently, was submitted

(Footnote continued)

additional authorization cards from Schifano about the 17th of January and that he distributed about 12 of these cards to employees during the month of January at various locations and in the evening of the 30th of January, during a Union meeting at the Union hall, he secured an additional five cards which he distributed to employees at the meeting. At one point, Greene testified that he secured seven signed authorization cards, but he did not state where or when he secured these cards. At another point, Greene testified that with the exception of the one card that he gave to the employee at the subway station, all authorization cards, including his card, were signed at the Union meeting on the 30th of January 1985. Greene claimed that he did not sign an authorization card until the Union meeting because he believed that the card he had signed previously while employed at B.R.B. Iron Works was sufficient. According to Greene, Schifano did not ask him to sign a new authorization card or explain to him why it was necessary to sign a new card at any time before the Union meeting on the 30th of January 1985. Greene's recollection about when, where or the number of employees he spoke to about the Union also varied constantly throughout his testimony. At one point, Greene testified that he spoke to 9 employees and at another point he testified that he spoke to 12 out of 15 employees.

According to Greene, a day or two before the 30th of January 1985, Schifano told him that he wanted to hold a Union meeting at the Union hall and he requested Greene to ask the other employers to be present. Greene testified that he spoke to other employees about the meeting, either by telephone or in the locker room, and he asked them to attend the meeting which was scheduled for 5:30 p.m. Although the employees usually left work at about 4:30 p.m., Greene testified that on the 30th of January 1985 the employees left the locker room about 5:10 p.m. and as they left they observed Wardrop and Colon, another supervisor, standing at the door. Greene admitted that it was not unusual for employees to leave in a group, nor was it unusual for supervisors to be standing at the entrance, which was also

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to the Board in connection with the representation petition because it bears the Board's stamp. Dyall's card was not submitted.

the exit, to the shop. Schifano, Greene and Chinfloo testified that the meeting was held on the 30th of January as planned and it was attended by 8 of the approximately 15 employees in the unit. Greene admitted that Brown was not present at the meeting and there is no evidence that any supervisor was present. Schifano, Greene and Chinfloo testified that during the meeting there was general discussion about the benefits the Union could secure and about the possibility of an election. However, their recollection about other events that took place at the meeting differed. As noted, at one point Greene claimed that he had secured seven signed authorization cards, but subsequently, he claimed that he had received only one signed authorization card before the Union meeting and the other eight or nine cards, including his card and that of Chinfloo, were signed by the employees during that meeting. Schifano claimed that Greene had returned some signed authorization cards to him before the meeting, he could not recall how many, and that other cards were signed by the employees during the meeting. Chinfloo testified that Greene gave him an authorization card in early January 1985, he took the card and told Greene he would think about it. Thereafter, on the 30th of January, but before the meeting, he signed the card and he handed it to Greene during the meeting. In the affidavit secured from Chinfloo during the investigation of the case, he stated that he signed the authorization card when Green gave it to him and he returned it to Greene at the jobsite.

C. *The Status of Brown*

Greene testified that he became angry when Brown interfered with the work his group was doing on the 31st of January 1985 because he did not consider that Brown was his supervisor. It was Greene's position that his status was the same as Brown's status and, therefore, Brown had no right to tell him what to do. The record reveals that Greene applied for a position as a welder, however, he testified that he considered himself to be a welder-mechanic. When questioned as to whether he had been told by Respondent's representatives that that was his classification, Greene admitted that he had not been told this and that

it was his opinion that that was his classification. It is undisputed that Brown, who had more seniority than Greene, was a mechanic who was paid, at the time of the events in this case, at a rate of $11.50 an hour, while Greene was paid at the rate of $8.50 an hour. Moreover, it was evident that Brown could read blueprints and that Greene, when tested during the hearing, could not do so, although he testified that he was capable of reading such prints. Wardrop and Brown both testified that Brown became a leadman about mid-1984 and in that position, he received instructions from Wardrop about the work to be performed and he transmitted these instructions to the men on the job. Wardrop testified that at the time of these events he had two leadmen, Brown and Earl Mills[6] and one person, Tom Wardrop, in training to be a leadman. According to Wardrop, leadmen do not work alone, they work with other employees and they decide when other employees are to work at the site and the work they are to perform. A leadman also has the authority to change the work employees are doing when he considers it necessary to do so and he does this without prior consultation with Wardrop, who normally rotates from job-to-job each day. Leadmen do not have the authority to hire or fire employees, but they are responsible to report to Wardrop when they consider that an employee's work is unsatisfactory. It is also the leadman's responsibility to decide when a job is completed and to advise Wardrop of this fact. Finally, Chinfloo who was hired after Greene, was paid at the same rate as Greene and he testified that when he worked with Greene he considered that he was an equal partner with Greene but when he worked with Brown, he worked as a helper.

D. *Brown's Knowledge About the Union*

Brown, initially, testified that he first became aware of the existence of the Union on the day before the election, which was held on the 20th of March 1985, when Schifano, the Union's representative, asked him to sign an authorization card, which

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[6] Mills had been the employee responsible for the Union's organizing efforts at B.R.B. Iron Works.

he refused to do.[7] Later, Brown testified that two days before the election he saw the Board's election notices and it was then that he became aware of the Union. The record reveals that Brown was friendly with Greene and the other employees, he drank with them, had their telephone numbers and they had his and he performed the same work they did and he used the same locker room. Further, it should be noted, with respect to Brown's claim of a lack of knowledge, that the Union filed its representation petition on the 7th of February 1985, Respondent agreed to an election on the 25th of February 1985, and Roth and Wardrop distributed literature to employees in the weeks before the election in which they urged the employees to reject the Union.

E. *The Discharge of Greene*

On 31 January 1985, two groups of employees were assigned to erect railings and gates at 97th Street off Central Park. Greene, Chinfloo and a new employee, Kevin Brennan, worked at one end of project, while Uriel Brown, and Tom Wardrop[8] worked at the other end of the project. It was Greene's position that Wardrop had assigned him to head one section of the project and had given him a sketch which detailed the work to be done, and that Wardrop had assigned Brown to head the other section and had given him a sketch to outline the work to be done by his group. Some several hours after the job started, Wardrop returned to the jobsite and, according to Greene and Chinfloo, he examined the work they were doing, expressed satisfaction with the job and then left to speak with Brown. A few minutes after Wardrop left the jobsite, Brown walked over to where Greene and Chinfloo were working and he began to criticize their work and told them they were too slow. Greene testified that he was angry because his group had progressed on their section further than Brown's group had and he told Brown to get off his job. Greene claimed that he also told Brown that he

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[7] Schifano claimed that it was in the week before the 6th of February 1985 that he asked Brown to sign an authorization card after Greene identified Brown for him.

[8] Tom Wardrop is the son of Walter Wardrop.

was tired of being used and that steps were being taken to change that. Brown responded that Greene was not to include him in any changes, he was not interested. Greene claimed that he had asked Brown on a prior occasion to sign an authorization card and Brown had refused. Brown denied that Greene had asked him to sign a card. Although Chinfloo testified that Brown criticized the work that they were doing, he did not testify that Greene told Brown that he was tired of being used, nor did he testify that Brown told Greene not to include him in any changes.

According to Wardrop, on the 31st of January 1985 he helped the men to unload the truck and then he left the site. He returned to the job between 1:00 p.m. and 2:00 p.m. and he observed that the section where Greene, Chinfloo and Brennan were working was set up wrong, the job was being done incorrectly and it was unsafe. He did not speak to Green or Chinfloo but he did speak to Brown who was the leadman. He did not consider Greene a leadman. He told Brown the job was being done incorrectly and he instructed Brown to check the work. Brown told him he would take care of the problem and Wardrop left the jobsite. The affidavit secured from Wardrop contradicts this testimony. According to the affidavit, Brown informed Wardrop that he gave Greene an assignment and it was taking Greene too long to do it. Brown also told him that when he tried to correct Greene, Greene screamed at him.

Brown testified that on the 31st of January 1985, Wardrop gave him instructions and the documents for the job at 97th Street. According to Brown, he was the leadman on the job and he assigned Greene, Chinfloo and Brennan, all of whom were helpers, to erect one section which he referred to as Section C, the most difficult section to erect. He worked with Tom Wardrop to erect the other section. Initially, Brown testified that at about 3:30 p.m. he went over to where Greene, Chinfloo and Brennan were working in order "to give them a hand" and he noticed that they were not doing the work properly, they were attempting to assemble three pieces of the railing at once, when they first should have anchored one piece of the railing to the wall. When he attempted to give instructions as to how the work should be done, Greene appeared to resent it and contradicted

him. On cross-examination, Brown stated that he did not make a thorough check on the progress of the work being done by Greene's group but he did make a quick check and the work seemed to be progressing at a normal rate. At about 1:00 p.m., Wardrop returned to the jobsite, he checked the work done by Greene's group and he returned and told Brown that the work was not being done properly, it was not safe and he told Brown to check the job. Brown claimed that he had not noticed how Greene and the others were doing the work until Wardrop spoke to him. He then checked and saw that they had done one section correctly but the section they were then working on was not being done properly, and he told this to the employees. He then instructed the employes as to how the work should be done and Chinfloo and Brennan followed his instructions but although Greene did not argue with him, he refused to change the way he was doing the work.

It is undisputed that later that day in the locker room, at about 4:30 p.m., Greene and Brown had a confrontation about Brown's efforts to correct Greene's work. According to Greene, he told Brown to quit "messing around" with his job, voices were raised and he might have said in more explicit language that Brown should not interfere with his work. Greene claimed that Wardrop came to the door of the locker room, asked what was going on and when Brown replied that they were having a discussion, Wardrop left the room. Brown testified that when he went to the locker room later that day, Greene confronted him and told him that he did not want Brown to interfere with his work again. Brown replied that he was trying to get the job done and he told Greene that he thought the matter was finished. At this point, Wardrop passed by and he asked Brown what was the problem and he told Wardrop what had happened and that he thought the matter was closed but Greene confronted him about it in the locker room. According to Brown, when he spoke to Wardrop, Greene was still in the locker room. Brown testified that he did not ask Wardrop to do anything about the matter, it had not been his intention to tell Wardrop about the incident, that he had done so only because Wardrop questioned him as he left the locker room.

Wardrop's testimony differs from Brown's testimony. According to Wardrop, he heard yelling and screaming in the locker

room, he opened the door and saw Greene, Brown and other employees and he asked what was the matter. Brown responded that he had an agrument but he did not say with whom he had the argument. Wardrop left the room. Later, Brown came to him and told him that he had attempted to assist Greene and others at the jobsite and Greene had yelled at him and told him to leave his work alone. Brown told Wardrop that when he tried to explain to Greene that what he was doing was wrong, Greene continued to scream at him. Wardrop said that Brown did not ask him to do anything, but he did say that he did not want that to happen again. Initially, Wardrop claimed that he went immeditely to look for Greene to fire him for insubordination but at that point Greene had left work.

According to Greene, on 1 February 1985 when he arrived at work at, 7:30 a.m., Wardrop called him to his office and told him that he was laying him off for a few weeks but that a "big job" was coming up and he would then be called back to work. Greene claimed that he asked Wardrop if he was dissatisfied with his work and Wardrop responded that he was not, that Greene should file for unemployment benefits because he was being laid off.[9] Greene admitted that he did not question Warrop about why Brennan and other employees with less seniority were being retained when he was being laid off. Greene testified that he spoke with Wardrop a week later about when he would be called back but Wardrop said that he was not ready to call him at that time.

Wardrop testified that on the 1st of February 1985 as soon as Greene arrived at work he told him that he was discharged for insubordination. He also told Greene, "You've been screwing up long enough and this is the final thing. I just can't take insubordination on the job anymore. You're fired." Although, as noted, Wardrop claimed, initially, that he had decided to fire Greene as soon as he heard Brown's story, on cross-examination, Wardrop testified that he did not make an immediate decision to discharge Greene when Brown reported the incident to him.

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[9] Greene did collect unemployment benefits.

Rather, he thought about the matter overnight and then he decided to discharge Greene, which he did the following morning. When counsel for the General Counsel asked Wardrop why he looked for Greene after his conversation with Brown, he stated that he looked for Greene, "Probably to raise hell with him." Further probing by counsel produced these responses by Wardrop.

Q. Were you prepared to fire him at that point?

A. Yes I was.

Q. So, actually,—was that right after you spoke with Brown?

A. I guess you can say that.

Q. So you made the decision right at the end of the conversation with Brown. . .then didn't you fire Mr. Greene?

A. Was I going to fire him at that time?

Q. Did you make the decision to fire Mr. Greene right at the end of your conversation with Mr. Brown?

A. No, I didn't.

Q. So when you went to see Mr. Greene, were you or were you not prepared to fire him when you went to look for him?

A. I was prepared to fire him but I didn't say I was going to fire him. But after I thought about it, I know that this had to be done.

Q. Okay, you say you were prepared. In other words, you didn't have a clear intention of going out to look for him to fire him, right?

A. At that—say that again Sir.

Q. You did not go to look for Greene with the clear intention that you were going to fire him when you found him.

A. Not really.

According to Wardrop's affidavit, after he spoke with Brown he went out to fire Greene but Greene had left the building. When this statement in the affidavit was called to his attention, Wardrop changed his prior testimony again and testified that when he went to look for Greene it was his intention to discharge him. Wardrop admitted that he did not ask Greene for his version of the events on the 30th of January 1985.

Although Brown had not requested Wardrop to discharge Greene, Wardrop testified that he decided to discharge him because he considered insubordination to be a very serious matter. Wardrop claimed that it was necessary for the employees to work together and to obey the instructions of the leadmen because the type of work they performed could be dangerous.

F. *The Discharge of Chinfloo*

Chinfloo began his employment with Respondent in September 1984. Chinfloo claimed that he applied for a position as a welder but when Wardrop hired him he did not tell him "definitely" what the job was for which he was hired. He denied, specifically, that Wardrop told him that he was hired as a helper or driver. Subsequently, he admitted that during the initial interview Wardrop asked to see his driver's license and told him that he would both drive a truck and go out on jobs. Chinfloo claimed that he told Wardrop that he was from the West Indies and was not familiar with the city but Wardrop assured him that it would not be a problem, he would be accompanied by other employees who would know the location of the jobsites.

During the period between September 1984 and February 1985, Chinfloo claimed that he drove the truck to jobsites on only ten occasions and the remainder of the time he worked at the jobsites, frequently with Greene. Chinfloo testified that about January 1985, Greene spoke to him about the benefits of the Union and he gave him an authorization card to sign. As noted above, Chinfloo's recollection about when he signed the card varied at different points in his testimony but he did state that he did not believe that any representative of Respondent was aware that he had signed an authorization card. Both in the

affidavit he gave the Board and in his initial testimony, Chinfloo claimed that it was on the 7th of February 1985 that he had a conversation with Wardrop, during which Wardrop told him that he had been instructed by "Jack"[10] to lay off a man and he, therefore, had to lay off Chinfloo. Chinfloo claimed that he recalled that the conversation occurred on the 7th of Feburary because he wrote down the date. During this conversation, Wardrop told that he would be laid off for only a few weeks, that he was a good man and he would be the first one to be recalled, when Wardrop "gets this thing straightened out." Chinfloo testified that he did not ask what things Wardrop referred to and he did not ask why he was being laid off when he had more seniority than Brennan. Chinfloo told Wardrop that he was moving and he gave Wardrop his new address and Wardrop then told him that he would let him know, definitely, by noon, whether he was laid off. Later that day, a foreman told Chinfloo that Wardrop said that Chinfloo should leave by 3:00 p.m. When Chinfloo asked whether that meant he was laid off, the foreman replied that it did. Chinfloo denied that Wardrop had told him at any time that he would be discharged if he did not become familiar with the city streets.

On cross-examination, Chinfloo admitted the conversation with Wardrop about his lay-off could have occurred on the 6th of February 1985. Chinfloo's payroll records establish that he worked eight hours on both the 4th and 5th of February and for half-a-day on the 6th of February 1985 and that, thereafter, he did not work for the Respondent. Chinfloo also recalled, on cross-examination, that sometime in early February 1985 he was told by Wardrop to pick up debris at some location on Riverside Drive, but he could not remember where he was to make the pickup and he could not describe how to get to the location. According to Chinfloo, Kevin Brennan was present when Wardrop asked him to pick up the debris but Brennan also did not know how to get to the jobsite and, therefore, they followed Wardrop to the site, made the pickup and returned, without Wardrop's assistance, to the shop.

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[10] Jack Roth, Respondent's president.

Wardrop testified that he hired Chinfloo as a driver-helper and he told him his classification when he hired him. Chinfloo said he was not familiar with the city but Wardrop told him he would learn. Thereafter, Chinfloo worked both in the field and the shop but, according to Wardrop, he was not a good worker, "he was slow and sloppy." After Chinfloo had been on the job for several months, Wardrop told him, a few days before the 6th of February 1985, to go to a site on 70th Street and West End Avenue to pick up some debris. Chinfloo said that he did not know how to get there and Wardrop claimed that he then described, in detail, the route Chinfloo was to follow but Chinfloo did not appear to be able to follow Wardrop's instructions. Wardrop claimed that he then drew a map detailing the route for Chinfloo to follow but Chinfloo could not follow these directions. At this point, Wardrop decided he had no choice but to drive to the site and have Chinfloo follow him with the truck. Wardrop testified that this was the first time he realized that Chinfloo had not learned his way around the city and he decided that it was useless to keep Chinfloo, who had been hired primarily to drive, if he could not follow directions. Therefore, on the 6th of February he called Chinfloo to his office about 12:30 or 1:00 p.m. and he told him that he was discharging him because his work performance was not satisfactory.[11] Wardrop claimed that he had planned to talk to Chinfloo before the 6th of February 1985 but he became involved with another job and was unable to do so until that time.

G. The Schifano Meeting

There is no dispute that Schifano came to the premises of the Respondent, met with Roth, the Company's president, and requested Roth to recognize the Union as the representative of his employees. However, there is a disagreement about the date when this meeting occurred. The counsel for the General Counsel contends that the meeting occurred on the 6th of February 1985 and the meeting was a significant factor in the discharge of Chinfloo, which occurred on that date, although as noted Chinfloo, initially, claimed that he was laid off on the 7th of February 1985.

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[11] Chinfloo collected unemployment insurance benefits.

Respondent's counsel claims that the meeting occurred on the 7th of February 1985, after Chinfloo had been discharged.

According to Schifano, he went to the Respondent's premises on the 6th of February 1985 at 7:45 a.m., with two other Union representatives, to seek recognition. When he arrived at the premises, the employees told him which person was Wardrop, he then spoke to Wardrop and told him that he was seeking recognition as the representative of Respondent's employees. Wardrop told him that he could not help him, he would have to speak with Roth, the Respondent's president. Schifano left but he claimed that he returned at about 10:00 a.m. on that same day and he met with Roth, told him that the employees had signed authorization cards for the Union and he asked Roth to enter into negotiations. Roth asked who had signed cards and Schifano agreed to show him the signed authorization cards provided that Roth would agree to recognize the Union. Roth responded that he would go out of business but Schifano testified that he persuaded Roth to meet with him the following dat at a nearby restaurant, the Fox & Hound, to discuss the matter. Schifano claimed that he was certain that his meeting with Roth took place on the 6th and not on the 7th of February 1985 because an entry in his calendar listed an appointment for the 7th of February at the Fox & Hound restaurant. However, when asked where that restaurant was located Schifano was unable to respond and there does not appear to be a listing in the telephone directory for such a restaurant in the nearby boroughs. Moreover, an examination of Schifano's calendar reveals that words were erased in the space where the name Fox & Hound appears.

According to Schifano, later in the day on the 6th of February 1985 he received a call from Roth's office and he was told that the scheduled meeting for the following day was cancelled and Schifano was told that he should contact Roth's attorneys. Schifano then called his office and advised them that they should file a representation petition.

In support of its position that Schifano met with Roth on the 6th of February, the Union called Ms. Harper, its counsel, as a witness. Ms. Harper had no direct knowledge with respect to

Schifano's meeting with Roth. However, she did testify with respect to an entry in her work diary concerning Respondent. According to that entry, Ms. Harper met with Don Bell, a Union representative, at 10:00 a.m. on the 7th of February to discuss the filing of a representation petition for Respondent's employees. Ms. Harper could not state the precise time when that meeting was arranged but she believed that it had to be sometime before 10:00 a.m. on the 7th of February 1985 and she based this belief on her normal practice when she arranged meetings with clients. Ms. Harper testified that when a client sought an appointment she entered a notation in her diary for that future appointment, she would not make such an entry at the time she actually met with the client. Further, it was her practice to arrive at her office between 10:05 and 10:10 a.m. Ms. Harper admitted that her secretary does make entries in her diary, at times, before she arrives at work but the entry respecting her meeting with Bell was in her handwriting. It was Ms. Harper's recollection, that the representation petition was prepared when Bell was present and that he hand delivered it to the Board. An examination of the petition, establishes that it was filed on the 7th of February 1985 at 2:50 p.m. and it shows that the space is blank with respect to when the request for recognition was made.

Roth did not testify but Wardrop testified that it was on the 7th of February 1985 when Schifano came to the Respondent's premises, introduced himself and asked to speak to the "boss" but he did not tell Wardrop why he wanted to see the "boss". Wardrop told Schifano that Roth, the president, would be in about 9:00 a.m. and Schifano left but returned at about 9:30 a.m. and he met with Roth. Wardrop claimed that he was present for part of the meeting and he heard Schifano tell Roth that he had organized the employees and that he wanted to sit down to talk with Roth.

Discussion

It is the position of counsel for the General Counsel that Greene initiated the organizing activities on behalf of the Union, that in the plant and at jobsites, he urged employees to join the Union and to sign authorization cards for it, that Respondent became

aware of the activities either through Brown or under the theory of the small plant doctrine and that Respondent discharged Greene because of these activities. Counsel concedes that Chinfloo's Union activities were limited to signing a Union autorization card and attending a Union meeting but counsel contends, nevertheless, that Respondent discharged Chinfloo either because it perceived him as being "guilty" by virtue of his association with Greene, or in an effort to reduce the number of employees who supported the Union or to camouflage Greene's discharge. In any event, he argues, Chinfloo's Union activity was the motivating factor in Respondent's decision to discharge Chinfloo. In the alternative, counsel argues that if the Administrative Law Judge finds that these employees were not discharged, but were laid off, then their Union activity was the reason for Respondent's failure to recall them. The counsel for the Union agrees with the arguments of the counsel for the General Counsel. In addition, she contends that if the discharges or layoffs are not found to be discriminatorily motivated, then the record supports a finding that the employees were temporarily laid off, had a reasonable expectancy of recall and, therefore, were entitled to vote and their ballots should be opened and counted. The Respondent has reiterated its argument that the Union failed to raise the issue of discriminatory discharges prior to the election and, therefore, it has waived its right to raise that issue in this proceeding. Counsel for Respondent also claims that the General Counsel has failed to establish any knowledge by Respondent's representatives of Union activity by employees. Finally, he argues that these employees were not laid off, they were discharged for cause.

All counsel agree that the case presents credibility issues, but each contends that the witnesses who testified in support of their position were completely trustworthy and it was the witnesses for the other side who slanted the truth. Unfortunately, the resolution of the credibility issue in this case is not that simple. My observation of the demeanor of all the witnesses and my examination of the record convinces me that witnesses for both sides tended to tell only part of the truth. Accordingly, in resolving the credibility issues I have accepted some portions of the testimony of the witnesses for both sides, and I have rejected other

portions of their testimony. The Court and the Board have stated that "a trier of the facts is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says." *NLRB v Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950); *PHA Incorporated*, 270 NLRB 998 (1984); *Brinkman Southeast*, 261 NLRB 204 (1982).

The first issue to consider is whether Greene was the employee who was responsible, initially, for the Union's presence at Respondent's premises. According to Greene, he was the employee who approached Schifano about organizing Respondent's employees and he, thereafter, urged employees to join the Union and to sign Union authorization cards. More specifically, Greene testified that in early January 1985 he went, alone and without an appointment, to the Union office where he spoke to Schifano about organizing the employees and Schifano gave him two authorization cards as "specimens" to show to the other employees. Schifano, who was called to testify on Greene's behalf, did not support this version of the alleged meeting. According to Schifano, in late december 1984 he first heard about Respondent because it was "brought to his attention by some — some of the employees working there." Schifano further testified that at some point in December 1984 he met with Greene, whether it was at the meeting with other employees or at another one is unclear, and he gave him 12 authorization cards to distribute to other employees. It is difficult to understand how the participants to this meeting could differ on such crucial points as to when the meeting occurred, who first informed Schifano about Respondent and the number of authorization cards given by Schifano to Greene. It is evident that the differences arose because Greene and Schifano testified about a meeting which had not occurred between them.

However, Schifano did meet to discuss organizing activities with an employee of Respondent in December 1984. The record reveals that on the 28th of December 1984 Leslie Earlington, then a Respondent employee, signed the first authorization card for the Union and he signed his card more than a month before Greene signed his authorization card. Generally speaking, the employee who contacts the Union signs either the first or one

of the first authorization cards.[12] Greene recognized this fact and he knew that his failure to sign an authorization card until late January undercut his contention that he was the instigator of the organizing efforts on behalf of the Union. He, therefore, offered an explanation for his failure to sign the card before the 30th of January 1985. That explanation is not plausible. Greene claimed that he did not sign the authorization card at an earlier date because he believed that the authorization card that he had signed for the Union while employed at B.R.B. Iron Works was sufficient. It is unbelievable that Schifano, an experienced organizer, would have failed to inform Greene of the need to sign a new card, particularly if Schifano met with Greene as frequently as he claimed he did throughout the month of January 1985.

There was further contradictory testimony given by Schifano and Greene, which casts doubt on Greene's assertion that he was the main employee organizer for the Union. Schifano claimed that he gave authorization cards to Greene on only one occasion. However, Greene testified that he received authorization cards from Schifano on two occasions, the first time was in early January, the second time was about the middle of January 1985. According to Schifano, he received several signed authorization cards from Greene before the 20th of January 1985. Greene's testimony on this issue varied at different points. Although Greene testified, at one point, that he secured seven signed authorization cards, apparently before the 30th of January 1985, he did not state that he gave these cards to Schifano. Subsequently, he testified that he secured only one signed authorization card before the 30th of January 1985, the other cards, including his card and that of Chinfloo, were signed at the Union meeting held at the end of January. Greene' testimony and the statements he made in his affidavit about when he secured the one signed authorization card also were not the same. He testified that he secured the card on the second Wednesday in January 1985, however his affidavit stated that he secured the card on the 28th of January 1985. In fact, the card that Greene claimed he secured was signed

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[12] As noted, Earlington was discharged in January 1985.

on the 20th of January 1985. Greene's testimony concerning the number of employees he spoke to about the Union also varied depending on when he testified about the matter.

I do not credit Green's assertion that he was the prime mover in the organizing efforts for the Union and I base this conclusion not only on my observation of Greene's demeanor, but on the internal contradictions in his testimony and on the contradictions between his testimony and that of Schifano. In determining that Greene's testimony was not trustworthy with respect to his contention that he instigated the Union activity, I have also considered his testimony with respect to his prior separation from Respondent in June 1984. Greene claimed that he was laid off and not fired for drinking. However, an examination of Greene's entire testimony and that of Brown on this issue established that Greene, in fact, was fired in June 1984 for drinking on the job.

The record established that the Union's efforts to organize Respondent's employees began at least as early as the 28th of December 1984, as evidenced by the fact that Earlington signed an authorization card for the Union on that day. The record established that these organizing efforts continued in January 1985 and that on the 20th of January 1985 Carrol Dyall also signed an authorization card for the Union.[13] Although, I do not find that Greene was as actively involved in these organizing efforts as he claimed, I do find that both Greene and Chinfloo were part of the group who met in the locker room and agreed to attend the Union meeting on the 30th of January 1985 during which they both signed authorization cards for the Union, which cards were submitted to the Board in support of the representation petition.[14] It is Respondent's position that it was unaware of any Union activity by Greene, Chinfloo or any of its employees prior to the 7th day of February 1985 and that,

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[13] Dyall also was discharged in January 1985.

[14] In view of my finding concerning Greene's role in the organizing efforts, I do not credit Chinfloo's testimony that Greene gave him an authorization card at a jobsite sometime in January 1985.

therefore, it could not have discharged either Greene or Chinfloo because of such activity. I do not credit that contention.

Wardrop testified that Brown was a leadman and in that capacity, at the time of the events in this case, he had certain responsibilities over the actions of the other employees when Wardrop was not at the jobsite, which occurred frequently because Wardrop rotated from one job to another. According to Wardrop, leadmen had the authority to assign men on the job, to determine the work the men were to do, to rotate them if he determined that it was necessary and to perform these functions without prior consultation with Wardrop. Leadmen also had the responsibility to decide lunch and break periods, to decide when a job was finished and to tell the men when they could return to the shop. Although leadmen did not have the authority to hire, fire or reprimand an employee, it was their responsibility to inform Wardrop about any dissatisfaction they had with an employee and about any problem which arose on the job. Greene's claim that he had the same status as Brown is not supported by the evidence in this record. The record reveals that Brown was paid at the rate of $11.50 an hour, while Greene was paid at the rate of $8.50 an hour, the same amount paid to Chinfloo, who was a new employee. Brown had greater seniority than Greene and unlike Greene he had the ability to read blueprints, which would be necessary in order to direct the work of the other employees. Significantly, Chinfloo testified that when he worked with Greene he considered that they worked on an equal basis but when he worked with Brown, he worked as a helper to Brown. Based on this record, I find that Brown responsibly directed other employees and that he was a supervisor within the meaning of Section 2(11) of the Act. *Dale Service Corp.*, 269 NLRB 924 (1984); *Serendippity-Un Ltd. and Tiggerir, Inc.*, 263 NLRB 768, 771 (1982).

In an effort to establish Brown's knowledge of Union activities, Greene claimed that in January 1985 he asked Brown to sign an authorization card. In view of my findings concerning Greene's role in the Union organizing efforts, I do not credit that claim. Schifano testified that he solicited Brown to sign an authorization card in the week before the 6th of February 1985. Brown admitted that Schifano asked him to sign an authorization card

but he testified that the incident occurred a day or two before the election which was held on the 19th of March 1985. This disparity in the dates concerning this incident illustrates my prior statement that in the instant case witnesses for both sides tailored their testimony to suit the positions they held. Thus, Schifano claimed the incident occurred the week before the 6th of February 1985 in order to establish Respondent's knowledge of the Union activities by employees before the layoff or discharge of Greene and Chinfloo. Brown testified that it occurred later to support his position that he had no knowledge of Union activities until well after the discharges. Respondent has advanced many theories to support its position that the incident could not have occurred as early as Schifano claimed and the counsel for the General Counsel has argued that it could not have occurred as late as Brown claimed. The fact is that the evidence in the record is insufficient to establish the exact date when the incident did occur. However, I am not convinced that it occurred as early as Schifano claimed or as late as Brown stated. Although the date of this particular incident is uncertain, I find, for other reasons, that Brown did have knowledge of the Union activities of the employees before the 1st of February 1985.

Brown, initially, testified that he first became aware of the existence of the Union on the 19th of March 1985. He then testified that he became aware of the Union about a day or two before the election when he saw the Board's election notices in the plant. That testimony must be evaluated in light of the circumstances which existed at that time in the plant. The shop where Brown and the other employees worked was a small one, there were 15 employees in the unit and Brown worked closely with these employees, often performing the same work they did. He shared a locker room with these employees, and he was on a friendly basis with them both during and after work hours. He exchanged telephone numbers with several of the employees and he frequently had drinks with them at a local restaurant. Notwithstanding his friendship with these employees, and his presence with them on the job and in the locker room, it was Brown's position that he had no knowledge about the Union until late March. If that testimony is credited, it means that Brown did not know that a representation petition had been filed in early February

1985 or that Respondent had agreed in late February 1985 that an election would be held. Further, it means that Brown continued to be unaware of any Union activity even when that activity was well known to Wardrop, who was Brown's immediate supervisor, and to Roth, the Respondent's president, both of whom were writing letters to employees, in the weeks before the election urging them to vote against Union representation. I do not credit Brown's testimony that he had not gained knowledge about the union activities of the employees in the circumstances which existed at the plant. In fact, Brown's efforts to distance himself from any knowledge of the employees Union acitivities raises the inference, which I make, that Brown, due to his relationship with the other employees and the size of the plant, was aware of the Union activities of the employees from sometime before 1st of February 1985. The Board has held that knowledge of Union activities of employees need not always be established by direct evidence, reliance may be placed on circumstantial evidence and knowledge may be inferred from the record as a whole. *Park General Clinic*, 218 NLRB 540, 544 (1975); *Thunderbird Motel, Co.*, 180 NLRB 656, 658 (1978). Although there is no direct evidence that Brown transmitted this information to Wardrop, the Board has held that a supervisor's knowledge of the Union activities of the employees can be imputed to his superior. *Herb Kohn Electric Co.*, 272 NLRB 815, 819 (1984); *Hawthorne Mazado, Inc.*, 251 NLRB 313, 316 (1980).

As noted, on the evening of the 30th of January 1985, after discussing the matter in the locker room, a group of employees, including Greene and Chinfloo, left work to attend a Union meeting. Insofar as this record discloses, this was the first time this had happened. Greene claimed that as the men left work they were observed by Wardrop and Colon, another supervisor, but Greene admitted that this was not unusual. On the following day, an incident occurred which involved Greene and Brown. Wardrop claimed that the incident was of such a serious nature that it required him to discharge Greene. There is no dispute that Greene's work was criticized by Brown on the 31st of January 1985. However, I am not convinced that the criticism was justified or that Wardrop, under other circumstances would have viewed the events that followed thereafter as grounds to discharge Greene.

Rather, I believe that Wardrop used the incident to discharge Greene because of his support for the Union.

An examination of the testimony given by Brown and Wardrop about the entire incident discloses significant differences in their versions of the events. According to Greene and Chinfloo, Wardrop came to the jobsite at about 12:30 or 1:00 p.m. on the 30th of January 1985, expressed satisfaction with the work the men were doing, spoke to Brown and left the site. Brown then came to where Greene and Chinfloo were working, and told the men to "push" the job. Statements made by Wardrop in his affidavit tend to support, at lease in part, Greene's version of what happened. According to those statements, it was Brown who came to Wardrop to complain about the slow progress of the work being performed by Greene and Chinfloo. The testimony, given by Wardrop, however, was completely different from the statements contained in his affidavit. According to Wardrop's testimony, he observed the work being done by Greene and his group, he considered that the work was being performed in a dangerous manner and he instructed Brown to correct the way work was being done, after Brown completed his own work. If, in fact, the work was being done in a dangerous manner it is surprising that Wardrop did not speak directly to Greene or at least that he did not direct Brown to speak immediately to Greene about the problem. According to Wardrop, he not only did not speak to Greene but he left the jobsite when he knew a dangerous condition existed, which had not been corrected. Brown gave two versions concerning this incident. According to Brown's testimony on direct examination, at about 3:30 p.m., which was almost the end of the work day, he observed that Greene's group was not performing the work correctly, he told this to the group and he instructed them as to the way the work should be done. However, on cross-examination, Brown changed both the time the incident occurred and the individual who first observed the manner in which the work was being performed. Thus, he testified that the incident occurred at 12:30 or 1:00 p.m. and that it was Wardrop who first noticed that the work was being performed in an incorrect manner. These numerous contradictions by Respondent's witnesses about the event raises suspicions about whether there was, in fact, any real reason to criticize the work being performed

by Greene's group. Admittedly, Greene did not consider that there was and he expressed his irritation to Brown about what he considered to be unjustified criticism. Wardrop claimed that it was Greene's conduct in expressing this irritation which he considered so serious that it warranted Greene's discharge. I do not credit that assertion.

It was evident that Brown, who had the disagreement with Greene, considered the entire incident a trivial one. In fact, according to Brown, he had not intended to discuss the matter with Wardrop and did so only because he met Wardrop as he left the locker room and Wardrop questioned him about what had happened. Brown did tell Wardrop that Greene appeared to resent his criticism but Brown did not ask Wardrop either to speak to Greene or to reprimand him. Wardrop did not agree with Brown's version of this incident. Wardrop, apparently to support his position of the seriousness of the incident, claimed that it was Brown who came to his office to complain about Greene's conduct. Although Wardrop admitted that Brown did not ask him to reprimand Greene, Wardrop claimed that he decided he had to do something about Greene's conduct. Brown testified that Greene was still in the locker room when he left the room and saw Wardrop. Wardrop claimed that after he spoke to Brown he looked for Greene but Greene had left the building. Wardrop's testimony about what he intended to do about Greene's conduct and when he made that decision changed so frequently that it was difficult to follow it. Wardrop claimed that he looked for Greene immediately after he spoke to Brown because he wanted to "raise hell with him." However, later, he testified that he looked for Greene immediately after Brown spoke to him in order to discharge him. He then testified that he thought about it overnight and it was then that he decided to discharge Greene. Subsequently, he changed that testimony again and stated that he made an immediate decision to discharge Greene because of his insubordination. It is impossible to believe that Wardrop would be uncertain as to whether his decision was "to raise hell with Greene" or to discharge him. There is a significant difference between those two options. It is also unlikely that Wardrop would be confused about whether he made the decision after he spoke to Brown or at some point during the night when he thought about the

matter. This confused and contradictory testimony establishes that Wardrop did not testify truthfully when he said that he told Greene he was discharged for insubordination.[15] It also establishes that he was not truthful when he claimed that it was Greene's insubordination which caused his discharge. The courts and the Board have held that if the stated motive for a discharge is false, then a judge may infer that there is another motive, an illegal one the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Professional Air Traffic Controllers Organization*, 261 NLRB 922, 932 (1982); *Kenco Plastics Company, Inc.*, 260 NLRB 1420, 1421 (1982).

Based on the evidence in this case I find, under the standard set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), that the General Counsel has established that Greene's support for the Union was a motivating factor in his discharge and Respondent has failed to demonstrate that it would have taken the same action against him absent his Union activities. Thus, I find that Respondent's employees commenced their activities on behalf of the Union in December 1984, that Brown, a supervisor who spent a considerable amount of time with the small complement of employees, including Greene, both during and after work hours, became aware of these activities, that Respondent expressed its opposition to these Union activities of its employees,[16] that Greene attended the meeting in the locker room where the employees agreed to go to the Union meeting, that he attended the Union meeting and signed a Union

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[15] In fact, Wardrop's lack of certainity about when the decision was made to discharge Greene, tends to support Greene's assertion that he was never told that he was discharged. Greene's testimony about this issue also is supported by the fact that he collected unemployment insurance because he claimed he was laid off. There is no evidence that Respondent filed an objection to the receipt of these benefits.

[16] Although I find that Roth expressed his opposition to the Union, both in letters he sent to employees and in his statement to Schifano that he would go out of business, it should be noted that direct evidence of union animus is not required to establish that a layoff or discharge was unlawful. *Westinghouse Electric Corp.*, 235 NLRB 356, 358 (1978).

authorization card on the 30th of January 1985, that immediately thereafter he was discharged and that absent his Union activities Respondent would not have discharged Greene for the trivial incident which occurred on the 31st of January 1985. Accordingly, I find that Greene was discharged in violation of Section 8(a)(1) and (3) of the Act. *Allied Lettercraft Co., Inc.*, 272 NLRB 612 (1984); *Abbey Island Park Manor*, 267 NLRB 163 (1983).

Schifano and Wardrop both agree that Schifano came to Respondent's premises in early February 1985, spoke to Roth and demanded that he recognize the Union as the representative of his employees. However, they disagree about when the event occurred, about whether the meeting caused Chinfloo's discharge and/or layoff. Chinfloo had no knowledge about when a Union representative came to Respondent's premises but he testified that he heard it was the 7th of February 1985 and Chinfloo then proceeded to tailor his testimony to suit those hearsay statements. Thus, he testified, originally, that it was the 7th of February 1985 when Wardrop told him he was laid off. Wardrop claimed that it was the 6th of February 1985 when he told Chinfloo that he was discharged and in support of this position he offered Chinfloo's timecard, which establishes the last time Chinfloo worked for Respondent was noon on the 6th of February 1985. Chinfloo, after much probing, finally agreed the 6th of February was the last day that he worked for Respondent. It was Wardrop's position that Schifano did not come to Respondent's premises until the 7th of February 1985 and, therefore, Chinfloo's discharge could not have been related to Schifano's visit. I do not credit Wardrop's testimony concerning the date of Schifano's visit to the plant.

Schifano testified that he spoke to Roth about 10:00 a.m. on the 6th of February 1985, told him he represented a majority of employees and demanded recognition. Schifano also testified that Roth, initially, stated that he would go out of business but he then agreed to a meeting to discuss the matter the following day. Later that day, Roth's office called to cancel the meeting and, therefore, Schifano, on the 6th of February 1985, contacted his office and told them to file a representation petition with the

Board. Although I find that Schifano embellished his testimony to establish that it was the 6th of February 1985 when he met with Roth, I credit the essential parts of his testimony for the following reasons. First, Roth, the president of the Company was not called to testify and he did not refute Schifano's testimony about this meeting. It is well established that an adverse inference can be drawn when a witness within the control of a Respondent fails to testify. *Laredo Coca-Cola Bottling v NLRB*, 613 F.2d 1338 (1980). Moreover, I observed Wardrop who did testify about the incident and I was not convinced that his testimony was truthful. Finally, I credit the testimony of the Union's counsel which tends to support Schifano's testimony that he met with Roth on the 6th of February 1985 and I base my credibility resolution on my observation of counsel and on the notations contained in her work diary. Ms. Harper, credibly testified, that it was her practice to arrange appointments before they occurred, that her dairy disclosed that she had scheduled an appointment for 10:00 a.m. on the 7th of February 1985, concerning Respondent's employees, with a representative of the Union, that she usually did not arrive at her office until 10:00 a.m. and that the notation about this appointment was in her handwriting. The implication of that testimony is that Ms. Harper scheduled an appointment with a Union representative to discuss the situation at Respondent's premises sometime before the 7th of February 1985. Further, Ms. Harper credibly testified that the subject matter of her conversation with the Union representative was the Union's request that a representation petition be filed for Respondents employees. Ms. Harper's testimony supports Schifano's statements that it was the 6th of February 1985 when Roth called to canel a scheduled meeting and that it was that day when he called his office and told them that a representation petition had to be filed. Accordingly, I find that it was the morning of 6th of February 1985 when Schifano demanded that Respondent recognize the Union as the collective-bargaining representative of its employees and that it was within a few hours thereafter that Chinfloo was discharged.

As noted above, immediately after the employees, including Greene and Chinfloo, agreed in the locker room to attend a Union meeting, attended that meeting and signed authorization cards

for the Union, Wardrop seized upon an incident to discharge Greene because he supported the Union. The same pattern was followed with respect to Chinfloo. Chinfloo was discharged, within hours after Schifano came to the plant, allegedly for an incident which occurred in early February 1985. I do not credit Wardrop's explanation that he did not discharge Chinfloo at the time of the incident because he was busy with other projects. It is obvious that if Wardrop considered Chinfloo's inability to locate a particular jobsite to be serious he would have discharged him at the time the incident occurred. That Wardrop did not consider the matter important is evident from the fact that he did not reprimand Chinfloo at the time the incident occurred or mention it to Chinfloo. Wardrop knew from the beginning of Chinfloo's employment that his knowledge of the city was limited but Chinfloo was able to cope with the problem, for many months, apparently to Wardrop's satisfaction. It is unlikely in these circumstances that Wardrop would have discharged Chinfloo because of his failure on one occasion to locate a particular site. As in the case of Greene, Wardrop seized upon a situation to discharge Chinfloo, which absent Chinfloo's support for the Union he would not have done. In these circumstances, I find that Respondent violated Section 8(a)(1) and (3) when it discharged Chinfloo. *Taylor Hospital*, 272 NLRB 697, 702 (1984).

Although, as I have observed, I have not credited all the testimony given by Greene and Chinfloo, I do credit their testimony that Wardrop told them they were laid off and did not tell them that they were discharged. I base this conclusion on the contradictory testimony given by Wardrop with respect to this issue and to the fact that both Greene and Chinfloo collected unemployment benefits without objection by Respondent. It is unlikely that Respondent would have permitted these employees to receive such benefits if they had been discharged for cause. However, although I find that Wardrop told Greene and Chinfloo that they were laid off and would be recalled, I have concluded that Wardrop, in fact, discriminatorily discharged the two employees.[17]

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[17] Respondent has not cited any support for its position that the Union waived its right to argue the issue of discriminatory discharges because it failed to raise

(Footnote continued)

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Phillip Greene and Cessil Chinfloo.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recomend that it cease and desist from engaging in such unfair labor practices and take certain affirmative action set forth below. Respondent shall offer to Phillip Greene and Cessil Chinfloo, immediate and full reinstatement to their former positions without prejudice to their seniority or other rights or privileges. In addition, Respondent shall make Greene and Chinfloo whole for any loss of earnings or other benefits they may have suffered by reason of the discrimination practiced against them. All backpay shall be computed in the manner set forth in *F.W. Woolworth Company*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Additionally, I shall require that Respondent expunge from its records any reference to the unlawful discharges of Greene and Chinfloo. Respondent shall also be required to provide written notice of such expunctions and to inform them that Respondent's unlawful conduct will not be used as a basis for further personnel actions concerning them. *Sterling Sugars, Inc.*, 261 No. 71 (1981).

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that issue prior to the election. I do not find any validity to that argument. Moreover, any ambiguity that exists with respect to the status of these employees is the result of the Wardrop's verbal statements to the employees and his actual intent with respect to that status.

Upon the foreoing findings of fact, conclusions of law, and the entire record pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER [18]

The Respondent, Clark and Wilkins Industries, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging and thereafter refusing to reinstate its employees because of their activities on behalf of or their support for Shopmen's Local Union #455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Phillip Greene and Cessil Chinfloo full and immediate reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or to other rights and privileges previously enjoyed.

(b) Make whole Greene and Chinfloo for any loss of earnings they may have suffered by reason of the discrimination against

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[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

them in the manner set forth in the section entitled "The Remedy".

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in New York, New York, copies of the attached notice marked "Appendix".[19] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

It is further recommended that the Regional Director for Region 2 shall, within 10 days from the date of this decision, open and count the ballots cast by Phillip Greene and Cessil Chinfloo in Case No. 2-RC-19908 and prepare and serve on the parties a revised tally of ballots. If the revised tally reveals that the Union has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative. However, if the revised tally shows that the Union has not received a majority of the valid ballots cast the Regional Director shall set aside

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[19] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the election results and forward the case to the Board for further consideration.[20]

Dated, Washington, D.C. 31 March 1986

/s/ Winifred D. Morio

Winifred D. Morio
Administrative Law Judge

[20] *The Gerber Co., Inc.*, 270 NLRB 1235, 1236 (1984).

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a heariang at which all parties had an opportunity to give evidence it has been found that we violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT discharge and thereafter refuse to reinstate our employees because of their activities on behalf of, or their support for the Shpmen's Local Union #455, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective-bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer to Phillip Greene and Cessil Chinfloo full and immediate reinstatement to their former or substantially equivalent positions of employment, without prejudice to their seniority or to other rights and privileges previously enjoyed.

WE WILL make whole Phillip Greene and Cessil Chinfloo for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section entitled "The Remedy". Further, we will expunge from our records any reference to the discharges of the above-named employees and notify them in writing that this has been done and that evidence of these discharges will not be used for future personnel actions against them.

CLARK & WILKINS INDUSTRIES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 2, Federal Building, Room 3614, 26 Federal Plaza, New York, New York 10278, Telephone 212-264-0360.

APPENDIX C

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1602 September Term, 1989

Clark & Wilkins Industries, Inc.,

Petitioner

v.

National Labor Relations Board

Respondent

Shopmen's Local Union No. 455, et al.,

Intervenor

FILED JAN 17 1990

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Buckley and Sentelle, Circuit Judges

O R D E R

Upon consideration of Petitioner's Petition for Rehearing, filed November 22, 1989, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1602 September Term, 1989

Clark & Wilkins Industries, Inc.,

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v.

National Labor Relations Board

Respondent

Shopmen's Local Union No. 455, et al.,

Intervenor

FILED JAN 17 1990

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Petitioner's Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk